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N. 3013

No. 15221

United States  
Court of Appeals  
for the Ninth Circuit

JOHN FARLEY, Appellant,  
vs.

UNITED STATES OF AMERICA, Appellee.

UNITED STATES OF AMERICA, Appellant,  
vs.

JOHN FARLEY, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 328, inclusive)

Appeals from the United States District Court for the  
District of Oregon

FILED

MAR - 6 1957

PAUL P. O'BRIEN, CLERK





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Portland 4, Oregon

For Appellee.





In the United States District Court for the  
District of Oregon

Civil No. 7435

JOHN FARLEY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

To the Honorable James A. Fee, Claude McCulloch  
and Gus J. Solomon, Judges of the District  
Court of the United States, for the District of  
Oregon.

In Admiralty Sitting:

The libel of John Farley against the United  
States of America, as represented by the United  
States Maritime Administration, successors to the  
United States Maritime Commission, successors to  
the National Shipping Authority, in a cause for  
damages and maintenance and cure resulting from  
the negligence of Respondent, and the unseaworth-  
iness of that certain merchant vessel "SS Augustin  
Daly," respectfully shows as follows:

Action Under Special Rule for Seamen to Sue  
with Security and Prepayment of Fees 28  
USCA Sec. 1916

I.

That at all times hereinafter mentioned, the Re-  
spondent, The United States of America, as repre-

sented by the United States Maritime Administration, successors to the United States Maritime Commission, successors to the National Shipping Authority, was engaged generally in the operation of merchant vessels, and among said merchant vessels which said Respondent owned, operated, controlled and managed, under what is commonly known as a "general agency agreement" with W. R. Chamberlin & Company, a corporation, general agent, was a vessel known as the SS Augustin Daly.

## II.

That heretofore, on or about the 25th day of March, 1954, Libelant made and presented a claim as herein alleged to the United States of America, Respondent, and to the general agent, W. R. Chamberlin & Company, and that said claim has been neither accepted nor rejected to this date, and the same is deemed administratively disallowed.

## III.

That on or about February 24, 1952, the Libelant signed articles aboard the SS Augustin Daly, and on said date was employed by the Respondent in the position of Second Assistant Engineer aboard said vessel; that thereafter and on or about April 5, 1952, at the approximate hour of 1 o'clock a.m., when said vessel was anchored in the harbor at the Port of Sasebo, Japan, the Libelant, while in the course of his employment, was returning to said vessel from authorized shore leave, and at said time was standing in a launch alongside of the ves-

sel while other members of the crew then and there returning to the vessel were ascending a pilot or "Jacob's" ladder which was then and there provided as the only means of ingress to said vessel; that at said time and place, due to the carelessness and negligence of the Respondent and the unseaworthiness of the vessel as hereinafter alleged, the Libellant sustained severe and grievous injuries as hereinafter alleged, when another member of the crew of said vessel was suddenly and violently precipitated from said Jacobs ladder over and against Libellant.

#### IV.

That Respondent was then and there reckless, careless and negligent in the following particulars:

(a) In maintaining a pilot or "Jacobs" ladder as the only means of ingress to said vessel under the circumstances then and there existing, when Respondent knew, or in the exercise of ordinary care should have known, that such action created a serious and imminent danger to crew members attempting to board said vessel, and particularly to Libellant herein.

(b) In failing to have in use an accommodation ladder, or other companionway type of gangway, to provide a safe means of ingress to said vessel under the circumstances then and there existing, when the Respondent knew, or in the exercise of ordinary care should have known, that such action created a serious and imminent danger to crew members attempting to board said vessel, and particularly to Libellant herein.



(c) In failing to provide adequate, or any, lighting on or near said Jacob's ladder under the circumstances then and there existing, when Respondent knew, or in the exercise of reasonable care should have known, that such failure created a serious and imminent danger to crew members attempting to ascend said ladder, and particularly to the Libelant herein.

(d) In failing to provide Libelant with a safe and seaworthy place in which to work, as aforesaid.

## V.

That said vessel was unseaworthy in that it was not equipped with safe, proper and seaworthy appliances appurtenant thereto, in that said vessel was not then and there rigged with a properly lighted companionway type of gangway so as to afford a safe means of ingress to said vessel.

## VI.

That as a direct and proximate result of the unseaworthiness of the said vessel, and the negligence of the United States of America as aforesaid, Libelant sustained a fracture of the right clavicle and compression fractures of several vertebrae in the dorsal spine, and a severe wrenching, twisting and tearing of the muscles, ligaments, tendons, nerves and soft tissues of his shoulder and of his upper and lower back, and an acute traumatic arthritis of the dorsal spine, and an aggravation of a pre-existing osteo-arthritis of the dorsal and lumbar spine, which was previously causing Libelant no pain or difficulty, all of which has caused Libelant

to suffer severe pain and distress, and has required that he provide himself with a brace to support his back, and that all of said injuries are permanent, and all to Libelant's damage in the amount of Ninety-Six Thousand Two Hundred Fifty-Seven (\$96,257.00) Dollars.

#### VII.

That prior to said injuries, Libelant was a healthy, robust and ablebodied man, of the age of fifty-eight (58) years, with a life expectancy of approximately 16.32 years, earning the approximate sum of Seven Hundred (\$700.00) Dollars per month, exclusive of room and board.

#### VIII.

That by reason of said injuries, Libelant has lost money wages in the approximate amount of Thirteen Thousand Seven Hundred Forty-Three (\$13,743.00) Dollars, which he claims as special damages, and will lose further wages.

#### IX.

That Libelant is entitled to maintenance and cure at the rate of Eight (\$8.00) Dollars per day for a period of three hundred sixty-five (365) days from July 23, 1953.

#### X.

That all and singular the terms are true, and within the admiralty and maritime jurisdiction of the United States of America, and of this Honorable Court; that the residence of Libelant herein is in the County of Washington, State of Oregon, and

said residence address is P. O. Box No. 15, Aloha, Oregon.

Wherefore, Libelant prays that citation in due form, according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against Respondent; that it may be required to appear and answer on all the matters aforesaid, and that this Honorable Court may be pleased to decree payment to Libelant of the sum of Thirteen Thousand Seven Hundred Forty-Three (\$13,743.00) Dollars as wages lost to the date of filing this suit, and for any additional wages that Libelant may lose prior to the time of trial hereof, and that Libelant may have the sum of Ninety-Six Thousand Two Hundred Fifty-Seven (\$96,257.00) Dollars as general damages; the sum of Two Thousand Nine Hundred Twenty (\$2,920.00) Dollars for maintenance and cure, and such other and further relief as in law and justice he may be entitled to receive.

WILLIAMS & ALLEY

/s/ By DAVID R. WILLIAMS

Of Proctors for Libelant

Duly Verified.

[Endorsed]: Filed April 2, 1954.

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[Title of District Court and Cause.]

### EXCEPTIONS

Comes now the respondent and proceeding in accordance with Rule 27 of the Rules of Practice in



Admiralty and Maritime Cases, excepts to the libel filed herein and moves the Court for an order dismissing the above entitled cause on the grounds that this Court does not have jurisdiction to hear and determine this suit and does not have jurisdiction over the person of the respondent or over the subject matter of this suit, and on the further and separate grounds that the libel herein does not state facts sufficient to constitute a cause of suit against the United States for the following reasons:

First: This libel was filed on or about April 2, 1954 against the United States under the Suits in Admiralty Act to recover damages for injuries sustained and to recover maintenance and cure. Paragraph II of said libel alleges that the libelant made and presented a claim to the United States of America, respondent, and to the general agent, W. R. Chamberlin & Company, on the 25th day of March, 1954, and that the claim has been neither accepted nor rejected to the date of the filing of this libel and that the same is deemed administratively disallowed.

Second: That it is necessary for the libelant to file an administrative claim against the United States and said claim must expressly be disallowed or sixty days must expire before the United States is subject to suit by said libelant, all in accordance with the Clarification Act, 57 Stat. 45, 50 U.S.C.A. App. 1291, Subsection (a), as reenacted by the Third Supplemental Appropriation Act of June 2, 1951, 65 Stat. 59, 46 U.S.C.A. 1241 (a), and the applicable regulations of the War Shipping Ad-

ministration, the Maritime Commission, and the Maritime Administration.

Third: That it appears on the face of the libel that it was not filed in compliance with the above statutes and regulations and the respondent United States of America has not otherwise consented to be sued herein.

Wherefore, respondent respectfully prays that the libel herein be dismissed.

/s/ C. E. LUCKEY,  
United States Attorney,  
/s/ VICTOR E. HARR,  
Assistant United States Attorney,  
Proctors for Respondent  
KRAUSE, EVANS & LINDSAY,  
/s/ JACK L. KENNEDY,  
Of Counsel to Proctors for  
Respondent

Acknowledgment of Service Attached.

[Endorsed]: Filed April 22, 1954.

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[Title of District Court and Cause.]

### ORDER OVERRULING EXCEPTIONS

This matter came on regularly for hearing on May 3, 1954, upon Respondent's exceptions to libel, and Motion to dismiss the same, and Respondent appearing by Jack L. Kennedy, of counsel to Proctors for Respondent, and Libelant appearing by David R. Williams of Proctors for Libelant, and

memorandum briefs having been submitted, and the Court being advised in the premises;

It Is Therefore Ordered, Adjudged and Decreed that Respondent's exceptions to libel heretofore filed be and the same hereby are overruled, and Respondent's Motion to dismiss the libel herein be and the same hereby is denied.

Dated this 7th day of May, 1954.

/s/ CLAUDE McCOLLOCH,  
Judge

[Endorsed]: Filed May 11, 1954.

---

[Title of District Court and Cause.]

### ANSWER

To the Honorable Claude McColloch and Gus J. Solomon, Judges of the United States District Court for the District of Oregon, in Admiralty sitting:

The answer of the respondent, United States of America, to the libel of John Farley, alleges upon information and belief as follows:

#### I.

Respondent denies each and every allegation in Article I of the libel, except that respondent admits and alleges that at all times mentioned in said libel it owned, operated, controlled and managed a certain merchant vessel known as the SS Augustin Daly, and that W. R. Chamberlin & Company, a corporation, acted as the shoreside husband for said vessel pursuant to an agreement between said corporation and the respondent.

## II.

Respondent denies each and every allegation in Article II of the libel, except that respondent admits and alleges that on or about the 25th day of March, 1954, libelant mailed a claim to the United States Maritime Administration and to W. R. Chamberlin & Company, and that said claim had never been accepted or rejected at the time of the filing of said libel.

## III.

Respondent denies each and every allegation in Article III of the libel, except that respondent admits and alleges that libelant signed articles aboard the SS Augustin Daly on or about February 25, 1952 and that he was thereafter employed as a second assistant engineer aboard said vessel and that libelant sustained some injuries on or about April 5, 1952 when another member of the crew of said vessel fell upon him.

## IV.

Respondent denies each and every allegation contained in Articles IV and V of the libel, and the whole thereof.

## V.

Respondent denies each and every allegation in Article VI of the libel, except that respondent admits that libelant sustained some injury, the exact extent thereof being unknown to the respondent.

## VI.

Respondent does not have any knowledge or information sufficient to form a belief as to the truth



or falsity of the allegations contained in Articles VII and VIII of the libel and therefore denies the same.

VII.

Respondent denies each and every allegation in Article IX of the libel and the whole thereof.

VIII.

Respondent denies each and every allegation in Article X of the libel, except that respondent admits that libelant resides in the County of Washington and State of Oregon.

Further answering the libel and for a first separate and affirmative defense, respondent alleges on information and belief as follows:

I.

On or about the 25th day of March, 1954, libelant mailed a claim to the United States Maritime Administration and to W. R. Chamberlin & Company and alleged that he sustained certain injuries on or about April 5, 1952 while serving aboard the SS Augustin Daly.

II.

Libelant commenced this suit on or about the 2nd day of April, 1954, and at the time of the filing of this libel said claim had not been accepted or rejected and sixty (60) days had not expired between the filing of said claim and the filing of said libel.

III.

Said claim must expressly be disallowed or sixty (60) days must expire between the filing of said

claim and the filing of said libel before the respondent United States of America can be sued herein, and this Court does not have jurisdiction over the person of the respondent or over the subject matter of this suit and the libel further does not state facts sufficient to constitute a cause of suit against the respondent.

Further answering the libel and for a second separate and affirmative defense, respondent alleges on information and belief as follows:

I.

Any injuries sustained by the libelant were proximately contributed to and caused, in whole or in part, by his own carelessness and negligence in standing directly under a ladder when another seaman was climbing said ladder and said injuries were not caused by any unseaworthiness or negligence on the part of the respondent.

Wherefore, respondent prays that the libel be dismissed with costs in favor of the respondent and that the Court grant to respondent such other and further relief as the justice of the cause may require.

/s/ C. E. LUCKEY

United States Attorney

/s/ VICTOR E. HARR

Assistant United States Attorney

Proctors for respondent United  
States of America

KRAUSE, EVANS & LINDSAY  
/s/ DENNIS LINDSAY  
/s/ JACK L. KENNEDY

Of Counsel to Respondent

Duly Verified.

[Endorsed]: Filed June 9, 1954.

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[Title of District Court and Cause.]

### PRETRIAL ORDER

The above entitled proceeding came on regularly for pretrial conference before the undersigned Judge of the above entitled Court on April 11, 1955. Thereupon the following proceedings were had:

Appearances, Proctors for Libelant John Farley: Williams & Alley, David R. Williams; Proctors for Respondent United States of America: C. E. Luckey, United States Attorney, Victor E. Harr, Assistant United States Attorney; Of Counsel to Proctors for Respondent United States of America: Krause, Evans & Lindsay, Dennis Lindsay, Jack L. Kennedy.

### Nature of Proceedings

This is a libel in personam instituted by a seaman against the United States under the Suits in Admiralty Act for damages and maintenance and cure arising out of personal injuries allegedly sustained on or about April 6, 1952 by libelant while he was employed by the United States on board the SS Augustin Daly.

## Admitted Facts

The following facts are admitted:

1. Libelant is a resident and inhabitant of the State of Oregon.

2. This libel is filed under the Suits in Admiralty Act contained in U.S.C.A., Section 741, to and including Section 752.

3. That at all times herein mentioned the respondent, the United States of America, owned, operated, managed and controlled a certain merchant vessel known as the "SS Augustin Daly", and W. R. Chamberlin & Company, a corporation, acted as the shoreside husband for said vessel pursuant to a "General Agency" Agreement between the respondent and said corporation.

4. On or about the 25th day of March, 1954, libelant mailed a Notice of Claim to W. R. Chamberlin & Company and to the United States Maritime Administration, which claim has never been expressly accepted or rejected. That on or about April 2, 1954, libelant filed his libel herein and commenced this suit.

5. On and prior to April 6, 1952, the libelant was employed by the respondent and was serving as a member of the crew on board the "SS Augustin Daly" in the capacity of Second Assistant Engineer.

6. On and prior to April 6, 1952, Malcolm Edward Potts was employed by the respondent and was serving as a member of the crew on board the



"SS Augustin Daly" in the capacity of Assistant Cook.

7. On or about April 6, 1952, the "SS Augustin Daly" was at anchor in the harbor of Sasebo, Japan, and a "Pilot" or "Jacob's" ladder was provided as a means of ingress and egress to and from said vessel.

8. On or about April 6, 1952, Malcolm Edward Potts fell into a small boat alongside the "SS Augustin Daly" as he was boarding said vessel. At said time and place the libelant was standing in the said small boat and he sustained certain personal injuries.

9. At the time and place of said accident, the libelant and the said Malcolm Edward Potts were returning to said vessel from shore leave.

10. At the time and place of said accident, the respondent was the employer of the master, officers and crew of said vessel.

11. At the time of said accident, libelant was earning base wages of \$435.89 per month, together with such overtime as he might earn, and he was also entitled to his room and board aboard said vessel.

12. At the time of said accident, libelant was fifty-eight (58) years of age.

13. Respondent has paid the libelant the following amounts in connection with the accident of April 6, 1952:

Maintenance from June 1, 1952 to July 23, except for periods of inpatient care, at \$8.00 a day, together with transportation charges for various trips to Seat- tle	\$2,739.00
Unearned wages from April 7, 1952 to August 13, 1952 (end of voyage)	1,859.79
Expense of hospital and medical treatment in Japan	259.25
Expense of board and room in Japan	132.28
Expense of repatriation from Japan to Vancouver, B. C.	350.00
Transportation expense from Vancouver, B. C. to Portland, Oregon	19.80
Total	\$5,360.12

(Libelant admits the receipt of the above amount but denies the relevancy or materiality of the fact of such payment inasmuch as libelant makes no claim for wages prior to August 13, 1952 or for maintenance or cure prior to July 23, 1953.)

#### Contentions of Libelant

1. That at the time of the accident causing injuries to libelant, Malcolm Edward Potts and libelant, John Farley, were acting within the scope of and in the course of their employment with respondent.

2. Libelant contends that at the time and place of said accident his injuries were caused without any contributing fault on his part and solely by the defective or unseaworthy condition of said vessel and its appurtenances, and/or the negligence of the

respondent, its officers, agents, and employees in one or more of the following particulars:

(a) Respondent was negligent in providing a "Pilot" or "Jacob's" ladder as the sole means of ingress or egress to said vessel for crew members, and particularly crew members returning from shore liberty.

(b) Respondent was negligent in failing to have in use an accommodation ladder or other companionway type gangway, to provide a safe means of ingress or egress to said vessel by crew members, and particularly crew members returning from shore liberty.

(c) Respondent was negligent in rigging the "Pilot" or "Jacob's" ladder to the boat deck of said vessel, instead of securing said ladder from the main deck of said vessel.

(d) Respondent was negligent in failing to provide a platform or other safe means to alight to the main deck level from the "Pilot" or "Jacob's" ladder rigged in the manner aforesaid.

(e) Respondent was negligent for having failed to instruct crew members of said vessel as to the proper and safe manner in which to ascend and descend the "Pilot" or "Jacob's" ladder rigged as aforesaid, and particularly in failing to instruct a non-licensed member of the crew, Malcolm Edward Potts, as to the proper and safe means in which to ascend said "Pilot" or "Jacob's" ladder.

(f) Respondent was negligent for having failed to supervise the boarding of said vessel by crew members ascending said Pilot" or "Jacob's" ladder while returning from shore liberty.

(g) Said respondent's servant and employee, Malcolm Edward Potts, was negligent in attempting to climb said "Pilot" or "Jacob's" ladder in boarding respondent's vessel while carrying one bottle in his right hand and another bottle under his left arm.

(h) Respondent was negligent in failing to provide libellant with a safe place in which to work.

(i) Said vessel was unseaworthy in that no safe and seaworthy means of ingress and egress was provided for crew members.

(j) Said vessel was unseaworthy in that a member of said vessel's crew, Malcolm Edward Potts, was an incompetent seaman, and was not equal in seamanship to ordinary men in that calling, in that said Malcolm Edward Potts was totally inexperienced and untrained in the ascent of a "Pilot" or a "Jacob's" ladder.

3. That as a proximate result of the negligence of the above-named respondent and/or the unseaworthiness of said vessel and its appurtenances, libellant was struck and smashed to the deck of a liberty launch which was laying alongside respondent's vessel by the body of respondent's servant, Malcolm Edward Potts, who fell while attempting to step from the said "Pilot" or "Jacob's" ladder to the main deck of respondent's vessel. That as a



result of said accident libelant sustained a concussion and was caused severe and grievous nervous shock and sustained fractures of the right clavicle and multiple compression fractures of several vertebrae in the dorsal and lumbar spine and a severe wrenching, twisting, and tearing of the muscles, ligaments, tendons, nerves and soft tissues of his shoulder and of his upper and lower back; a traumatic capsulitis or fibrosis of the right shoulder joint and limitation of right shoulder joint movement, and a loss of strength in the right arm and a loss of gripping functions of the right hand, and an aggravation of a pre-existing osteoarthritis of the dorsal spine which was previously causing libelant no pain or difficulty, and libelant has been required to provide himself with a brace with which to support his back; that said injuries have caused libelant to suffer severe pain, distress, and mental anguish, and will cause him further pain, distress, and mental anguish; and that all of said injuries are permanent, all to libelant's damage in the amount of Ninety-Six Thousand Two Hundred and Fifty-Seven Dollars (\$96,257.00).

4. That at the time of said accident libelant was a healthy robust man who was capable of engaging in strenuous manual labor, of the age of 58 years with a life expectancy under the U. S. life tables—1949-1951 of 17.05 years; earning the approximate sum of Seven Hundred Dollars (\$700.00) per month exclusive of room and board, as a marine engineer; that libelant has become totally incapacitated and unable to perform any gainful employment by

reason of said accident and as a result of said accident he will be permanently disabled from performing any manual labor or other gainful employment for which he is trained.

5. That as a proximate result of said negligence of the respondent and/or the unseaworthiness of said vessel and its appurtenances, libelant has lost wages on account of said injuries from August 13, 1952, to the present time in the approximate sum of \$24,600.00, and will lose further wages.

6. That medical expenses in the amount of \$1,134.65 has been necessarily incurred to date by libelant for the treatment of injuries received in said accident, and that said expenses have been incurred by libelant subsequent to July 23, 1953, the date on which respondent terminated libelant from further payment for maintenance and cure.

7. That libelant will incur further doctor and medical expenses at least in the sum of \$2,400.00.

8. That libelant is entitled to maintenance and cure at the rate of \$8.00 per day for a period from July 23, 1953, to date, and for an indefinite period of time in the future.

9. That libelant's damages, general and special, were proximately caused by the unseaworthiness of said vessel and/or the negligence of said respondent, its officers, agents, and employees.

10. Libelant denies all of the contentions of respondent except as admitted in libelant's contentions or in the admitted facts.

Contentions of Respondent

1. An administrative claim must expressly be disallowed or 60 days must expire between the filing of said claim and the filing of suit before respondent can be sued herein, and this Court does not have jurisdiction over the person of the respondent or over the subject matter of this suit and the libel and this pretrial order does not state facts sufficient to constitute a cause of suit against the respondent.

2. Any injury received by the libelant was not caused or contributed to in any manner by any negligence of the respondent or of its officers or employees or by any unseaworthiness of the "SS Augustin Daly."

3. Any injury received by the libelant was proximately caused in whole or in part by the negligence of the libelant himself in the following particulars:

(a) In failing to exercise any supervision or control over nonlicensed crew members while returning to said vessel in said shore boat under the circumstances then and there existing.

(b) In failing to supervise, control, correct or prevent any improper boarding of said vessel by nonlicensed crew members under the circumstances then and there existing.

(c) In standing under or near the "Pilot" or "Jacob's" ladder at a time when said Malcolm Edward Potts was climbing said ladder under the circumstances then and there existing.

4. Libelant had received the maximum benefit

of cure on or before July 23, 1953, and he is not entitled to any further maintenance herein.

5. Respondent denies the contentions of the libelant except as admitted in the above contentions or in the admitted facts.

### Issues

#### A. Jurisdiction

1. Does this Court have jurisdiction over the person of the respondent or over the subject matter of this suit because of the failure of libelant to have his claim administratively disallowed before filing his libel herein?

2. Does the libel or this pretrial order state a cause of suit because of the failure of libelant to have his claim administratively disallowed before filing his libel herein?

#### B. Unseaworthiness

1. Was the vessel unseaworthy in any of the respects contended for by the libelant?

2. If the vessel was unseaworthy, was such unseaworthiness the proximate cause of the accident?

#### C. Negligence

1. Was respondent negligent in any of the respects contended for by libelant?

2. If respondent was negligent, was such negligence the proximate cause of the accident?

3. Was the libelant negligent in any of the respects contended for by respondent?

4. If libelant was negligent, was such negligence a proximate or a contributing cause of the accident?



D. Damages

1. If respondent is liable to the libelant, what is the extent of the injury or injuries which he received from the accident of April 6, 1952 and what damages has he suffered as a result thereof?

2. If the negligence of libelant was a contributing cause of the accident, to what extent should his damages be mitigated or reduced?

E. Maintenance and Care

1. If respondent is liable to the libelant for any maintenance and cure beyond July 23, 1953, when did libelant reach the point of maximum benefit of cure and how many days is he entitled to the payment of maintenance?

Libelant's Exhibits

1. Deposition of Malcolm Edward Potts.

2-a-b-c. Doctors' office records and X-rays of libelant.

3. Report of William J. Accurso to United States Coast Guard, dated August 21, 1952.

4. Notice of Claim dated March 25, 1954.

5. Agreements between National Maritime Engineers Beneficial Association and Pacific Maritime Association covering Offshore, Intercoastal, and Alaska Trades, 1950 to present date.

6. United States Department of Commerce Continuous Discharge Book for John Farley.

7. Individual overtime statements and pay memoranda covering libelant's employment with Trans-Oceanic Steamship Company during the year 1951.

8. Letter of David R. Williams to Krause, Evans & Lindsay, Attorneys at Law, dated April 3, 1954.

9. Medical bills of libelant.

10. U. S. Life Tables.

11. Actuarial Tables.

12. U. S. Government Rules and Regulations.

13. Depositions.

14. Blueprint of Ship.

[Items 10 to 14 written in pencil.]

#### Respondent's Exhibits

1. Deposition of libelant.

2. Deposition of Glenn E. Morgan.

3. Deposition of Williams J. Accurso.

4. X-rays of libelant.

5. All clinical and other medical records of John Farley from the United States Marine Hospital, Seattle, Washington.

6. All medical records of John Farley from United States Public Health Service Outpatient Clinic, Portland, Oregon.

7. Smooth and rough log of "SS Augustin Daly" from 0001 February 9, 1952 to 2400 April 10, 1952.

8. X-ray doctors' office records of libelant.

9. Shipping Articles on voyage.

10. License and Oath—Farley (stub).

11. Deposition of S. L. Johnson.

[Items 9 to 11 written in pencil.]

Libelant and respondent admit the identity and authenticity of the foregoing exhibits and waive further identification but the parties reserve all objections to such exhibits on the grounds of rele-

vancy, materiality and competency, and the right to object to any of the questions propounded by the other in any of the depositions and interrogatories and the answers thereto on the grounds of competency, relevancy and materiality.

It is Hereby Ordered that the foregoing constitutes the pretrial order in the above-entitled cause, that it supersedes the pleadings therein and that said pretrial order shall not be amended during the trial except by consent or by order of the court to prevent manifest injustice.

Dated this 14th day of April, 1955.

/s/ GUS J. SOLOMON,

United States District Judge.

The foregoing form of pretrial order is hereby approved.

WILLIAMS & ALLEY,

/s/ DAVID R. WILLIAMS,

Proctors for Libelant John Farley

/s/ C. E. LUCKEY,

United States Attorney

/s/ VICTOR E. HARR,

Assistant United States Attorney

Proctors for Respondent United  
States of America

KRAUSE, EVANS & LINDSAY,

/s/ DENNIS LINDSAY,

/s/ JACK L. KENNEDY,

Of Counsel to Proctors for Respond-  
ent United States of America

[Endorsed]: Filed April 14, 1955.

[Title of District Court and Cause.]

### MINUTE ORDER

July 27, 1955

Now at this day come the libelant by Mr. Leonard D. Alley and Mr. David R. Williams, of proctors, and the respondent by Mr. Gunther F. Krause and Mr. Chick Chaloupka, of proctors. Whereupon, this cause comes on for trial before the Court, and the Court having heard the statements of proctors,

It Is Ordered that the parties hereto, be, and are hereby, allowed to amend the pre-trial order filed herein.

Thereafter, the Court having heard the evidence adduced, the trial of this cause is continued to tomorrow, Thursday, July 28, 1955, at ten o'clock a.m.

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[Title of District Court and Cause.]

### MINUTE ORDER

July 29, 1955

Now at this day come the libelant by Mr. Leonard D. Alley and Mr. David R. Williams, of proctors, and the respondent by Mr. Gunther F. Krause and Mr. Chick Chaloupka, of proctors. Whereupon, the trial of this cause before the Court is resumed, and the Court having heard the evidence adduced,

It Is Ordered that the libelant be, and is hereby, allowed to and including August 3, 1955, within which to file his brief; that respondent be, and is hereby, allowed to and including August 9, 1955, within which to file its answering brief, and that the libelant be, and is hereby, allowed to and in-



cluding August 12, 1955, within which to file his reply brief.

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[Title of District Court and Cause.]

### RESPONDENT'S BRIEF

\* \* \* \* \*

Libelant claims to have suffered a wage loss of approximately \$23,000.00. In view of the slack conditions of American shipping since termination of the Korean war, it is extremely problematical as to the amount of employment that libelant would have had. In all probability, his earnings from August 14, 1952 to the date of the trial would not have exceeded \$15,000.00.

Libelant is now 61 years of age. While there are older men serving as marine engineers, according to the testimony they were usually chief engineers and libelant holds only a second assistant's license. His failure to qualify for a higher rating in nearly 30 years as a second assistant would justify the conclusion that he would not qualify hereafter. It would therefore seem reasonable to conclude that libelant might anticipate some employment as a marine engineer until the age of 65. At that age he would qualify for the social security pension. In our view, his future earnings, had he not been injured, would be high if placed at \$20,000.00.

If libelant was injured solely through the fault of respondent, an award of from \$35,000.00 to \$40,000.00 would be fully compensatory. Assuming that respondent was at fault in any of the particu-

lars charged by libelant and that he was guilty merely of contributory negligence, it is our belief that the fault of respondent could in no view of the testimony be regarded as greater than that of libelant, and an award of from \$17,500.00 to \$20,000.00 would be proper.

\* \* \* \* \*

[Endorsed]: Filed August 15, 1955.

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### MEMORANDUM OPINION

November 8, 1955

David R. Williams

Williams & Alley

Attorneys at Law

1212 Failing Building

Portland 4, Oregon

Gunther Krause

Krause, Evans & Lindsay

Attorneys at Law

Portland Trust Building

Portland 4, Oregon

James Morrell

Assistant United States Attorney

U. S. Courthouse

Portland 5, Oregon

Re: John Farley vs. The United States of America, No. 7435.

Gentlemen:

The Court regrets the delay involved in determination of the above entitled matter. The Court has now had an opportunity to consider the evi-

dence and the law of the matter and concludes that the Court has jurisdiction of the parties and of the subject matter presented and is of the opinion that the evidence in behalf of libelant does not establish that the respondent, acting through the master, officers and the crew of the S. S. Augustin Daly, was negligent in any of the particulars set forth in the contentions of libelant. Nor that said vessel was unseaworthy in the particulars set forth in libelant's contentions.

It may be that the situation was due to the necessity of distant land travel in Japan following the accident, nevertheless the Court cannot refrain from commenting that it most strongly appears from the evidence that the seaman libelant received wholly inadequate diagnosis and medical treatment and care following his injury. I think he was treated very shabbily. However, this is a matter and situation for which the master, officers and crew of the vessel, so far as this matter is concerned, are not responsible.

The Court is further of the opinion that it is established by the preponderance of all the evidence in the case that the libelant was acting in the course of his employment as a member of the vessel's crew at the time and place of the accident and that the libelant did not reach "the maximum cure (of the injury sustained) within the reach of medical science" until July 21, 1955, and that therefore the libelant is entitled to have and recover of and from the respondent additional maintenance as allowable by law from and after July

23, 1953 until July 21, 1955, at the rate of \$8.00 per day.

Proctors for the libelant are requested to draw appropriate Findings, Conclusions and Judgment in conformity with this advice.

Very truly yours

WGE/J

.....

[Endorsed]: Filed November 8, 1955.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 27th day of July, 1955, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pre-trial order had been presented and approved by proctors for both parties and signed by the Court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The Court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel, and being now advised in the premises, makes its

### Findings of Fact

1. The Court adopts and enters among its Findings of Fact each and all of the facts designated as admitted facts by the parties in the aforesaid



pretrial order and being designated paragraphs numbered 1 to 13, both inclusive.

2. That at the time Malcolm Edward Potts was boarding the vessel as set forth in admitted fact number 8, he fell a distance of approximately 19 feet into the small boat located alongside said vessel, and at said time and place the falling body of Malcolm Edward Potts struck the libelant who was standing in said small boat as aforesaid. That at the time of said accident both Malcolm Edward Potts and the libelant were acting within the scope and in the course of their employment with respondent.

3. That at the time the said Malcolm Edward Potts was boarding said vessel through the use of a Jacob's ladder he was intoxicated and was carrying bottled goods in his hand and under his arm while climbing the ladder.

4. Libelant did not sustain his injuries because of any defective or unseaworthy condition of the vessel and her appurtenances or the negligence of respondent, its officers, agents and employees in any of the particulars set forth and claimed in the contentions of libelant set forth in the aforesaid pretrial order and being numbered paragraphs 1 and 2, and sub-section 2-a through 2-j, all included.

5. That if the vessel was unseaworthy or respondent, its agents or servants, was negligent in any of the particulars appearing in libelant's contentions, such unseaworthiness or negligence was not the proximate cause of libelant's injuries.

6. That the libelant's injuries received as afore-

said were not the result of any wilful misconduct on his part.

7. That the libelant did not obtain the maximum cure within the reach of medical science for his injuries aforesaid until July 21, 1955.

8. After the United States Public Health Service terminated libelant's treatment, the latter necessarily incurred expenses for further medical treatment in the reasonable sum of \$1357.00.

9. The sum of \$8.00 per day is a reasonable sum to be allowed libelant for the period from July 24, 1953 to and including July 21, 1955.

Based upon the foregoing Findings of Fact, the Court makes the following

### Conclusions of Law

#### I.

The Court has jurisdiction over the parties and the subject matter of this suit.

#### II.

Respondent's vessel was not unseaworthy in any of the particulars stated in libelant's contentions.

#### III.

Respondent was not negligent in any of the particulars stated in libelant's contentions and libelant's injuries were not proximately caused by any act or neglect stated in libelant's contentions.

#### IV.

Libelant was not negligent in any of the particulars set forth in the contentions of respondent, being particularly paragraph 3, 3-a through 3-c, all inclusive.

V.

Libelant is not entitled to recover damages from respondent and his libel for damages should be dismissed.

VI.

Libelant is entitled to recover from respondent additional maintenance from July 24, 1953 to July 21, 1955, inclusive, at the rate of \$8.00 per day, or a total of \$5,816.00.

VII.

Libelant is entitled to recover from respondent his expenses of medical treatment in the amount of \$1,357.00.

VIII.

Libelant is entitled to recover his costs and disbursements.

Dated, December 5, 1955.

/s/ WILLIAM G. EAST,  
U. S. District Judge.

[Endorsed]: Filed December 5, 1955.

---

[Title of District Court and Cause.]

DECREE

This cause came on regularly for trial before the Honorable William G. East, judge of the above entitled court, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pretrial order

had been presented and approved by proctors for both parties and signed by the court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel and having made and filed its Findings of Fact and Conclusions of Law,

It is now here ordered and decreed as follows:

1. That the libel for damages be and the same hereby is dismissed.

2. That libelant have and recover of and from respondent the sum of \$5816.00 on account of maintenance to and including July 21, 1955, and the further sum of \$1357.00 for medical expenses, and libelant's costs and disbursements herein taxed at \$172.51.

Dated this 5th day of December, 1955.

/s/ WILLIAM G. EAST,  
District Judge

[Endorsed]: Filed December 5, 1955.

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[Title of District Court and Cause.]

### ORDER

It appearing to the Court that heretofore on December 5, 1955, an order was made and entered herein denying the libelant's motion for a reconsideration of the Court's decision as expressed in



the memorandum opinion filed herein on November 8, 1955, and the Court being further advised in the premises,

It is hereby adjudged and ordered, that the aforesaid order dated December 5, 1955, be and the same is hereby set aside and held for naught.

It is further ordered, that the matter of libelant's motion as aforesaid be and the same is hereby held for further consideration.

Dated, December 22, 1955.

/s/ WILLIAM G. EAST,  
U. S. District Judge

[Endorsed]: Filed December 22, 1955.

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[Title of District Court and Cause.]

### ORDER

The Court having had under consideration of matter of libelant's motion that the Court reconsider its decision as expressed in the memorandum opinion filed herein on November 8, 1955, and having heard further argument and statement of the proctors for the respective parties, being now further advised in the premises, concludes that the decision aforesaid, the Findings of Fact and Conclusions of Law made and entered herein on December 5, 1955, and the Court's Decree made and entered herein on December 5, 1955, are erroneous under the facts and law of the matter.

Therefore, it is considered, adjudged and ordered, that the aforesaid Findings of Fact, Con-

clusions of Law and Decree, and each of them be and the same are hereby set aside and held for naught, and the matter reserved by the Court for further disposition herein.

Dated, January 27, 1956.

/s/ WILLIAM G. EAST,  
U. S. District Judge

[Endorsed]: Filed January 27, 1956.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 27th day of July, 1955, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pretrial order had been presented and approved by proctors for both parties and signed by the Court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The Court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel, and being now advised in the premises, makes its

### Findings of Fact

1. The Court adopts and enters among its Find-

ings of Fact each and all of the facts designated as admitted facts by the parties in the aforesaid pretrial order and being designated paragraphs numbered 1 to 13, both inclusive.

2. That at the time Malcolm Edward Potts was boarding the vessel as set forth in admitted fact number 8, he fell a distance of approximately 19 feet into the small boat located alongside said vessel, and at said time and place the falling body of Malcolm Edward Potts struck the libelant who was standing in said small boat as aforesaid, thereby causing libelant certain injuries.

3. That at the time and place of the fall of the said Malcolm Edward Potts, he was boarding respondent's vessel through the use of respondent's pilot or Jacob's ladder, and he was carrying one bottle in his right hand and another bottle under his left arm.

4. That the fall of Potts from the said pilot or Jacob's ladder was caused by the fact that he was encumbered with bottles as aforesaid, and the Court finds that said acts by respondent's servant Potts constitute negligence which proximately caused libelant's injuries.

5. That at the time and place of said accident, both Malcolm Edward Potts and the libelant were acting within the scope and in the course of their employment with respondent.

6. That the sole proximate cause of libelant's injuries was the negligence of respondent's servant Potts, and no acts or failure to act on the part of

libelant proximately caused or contributed to his injuries.

7. That libelant's injuries proximately caused by respondent's servant's negligence were a concussion and nervous shock, fracture of the right clavicle, fractures of the seventh, eighth, tenth and twelfth dorsal vertebrae, a severe wrenching and tearing of the muscles, ligaments, tendons, and soft tissues of the right shoulder and back, an irritation of the nerves in the back area, a traumatic capsulitis or fibrosis of the right shoulder joint, and an aggravation of a dormant pre-existing osteo-arthritis of the spine.

8. That by reason of said injuries, libelant has suffered considerable pain and distress, will permanently suffer pain and distress, has sustained a permanent limitation of motion in the right shoulder joint, a permanent limitation of motion and instability of the dorsal spine, a loss of strength and gripping function of the right arm and hand, and has become totally and permanently disabled from following his usual and ordinary occupation of merchant marine engineer or any other heavy employment, and is further permanently disabled to the extent of fifty per cent from performing light duty employment.

9. That at the time of libelant's said injury he was a healthy robust man, capable of engaging in strenuous labor, of the age of 58 years, with a life expectancy under United States Life Tables, 1949-1951, of 17.05 years, earning the approximate sum of \$700.00 per month, exclusive of room and board,



as a second assistant marine engineer; that libelant was, excepting one day, unemployed from the date of his injury, April 6, 1952, to the date of trial, July 27, 1955, as a result of said injuries; that since August 13, 1952, libelant has lost wages and will lose further wages by reason of said injuries.

10. That libelant sustained general and special damages as a proximate result of said accident in the amount of \$8,500.00.

11. That libelant did not obtain the maximum cure within the reach of medical science for his injuries aforesaid until July 21, 1955.

12. That after the United States Public Health Service terminated libelant's treatment in July, 1953, libelant necessarily incurred expenses for further medical treatment in the reasonable sum of \$1,357.00.

13. That libelant is entitled to maintenance from July 24, 1953, to and including July 21, 1955, at the rate of \$8.00 per day, which the Court finds to be a reasonable sum for maintenance.

Based upon the foregoing Findings of Fact, the Court makes the following

### Conclusions of Law

#### I.

The Court has jurisdiction over the parties and the subject matter of this suit.

#### II.

The negligence of respondent's servant Potts was the sole proximate cause of libelant's injuries and

respondent is liable for the negligence of its servant Potts.

### III.

Libelant was not negligent in any respect which proximately caused or contributed to his injuries.

### IV.

Libelant is entitled to recover general and special damages from respondent in the total amount of \$8,500.00.

### V.

Libelant is entitled to recover from respondent additional maintenance from July 24, 1953 to July 21, 1955, inclusive, at the rate of \$8.00 per day, or a total of \$5,816.00.

### VI.

Libelant is entitled to recover from respondent his expenses of medical treatment in the amount of \$1,357.00.

### VII.

Libelant is entitled to recover his costs and disbursements incurred herein.

Dated, March 23, 1956.

/s/ WILLIAM G. EAST,  
U. S. District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed March 23, 1956.

In the United States District Court  
for the District of Oregon

Civil No. 7435

JOHN FARLEY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

This cause came on regularly for trial before the Honorable William G. East, Judge of the above entitled Court, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pretrial order had been presented and approved by proctors for both parties and signed by the Court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The Court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel and having made and filed its Findings of Fact and Conclusions of Law dated March 23rd, 1956,

It is now here ordered and decreed as follows:

1. That libelant recover from respondent on his libel for damages the sum of \$8,500.00.
2. That libelant have and recover of and from respondent the sum of \$5,816.00 on account of

maintenance to and including July 21, 1955, the further sum of \$1,357.00 for medical expenses, and libelant's costs and disbursements herein taxed at \$172.51.

Dated this 23rd day of March, 1956.

/s/ WILLIAM G. EAST,  
District Judge

[Endorsed]: Filed March 23, 1956.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: United States of America as Respondent, C. E. Luckey, United States Attorney, Proctor for Respondent, and Krause, Evans & Lindsay, of Counsel to Proctors for Respondent, and R. DeMott, Clerk of the United States District Court for the District of Oregon:

You and each of you will please take notice that John Farley, libelant in the above entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the findings of fact, conclusions of law, and decree entered herein on or about the 23rd day of March, 1956, which finds, orders, and decrees that libelant is entitled to recovery from respondent upon his libel for damages the sum of \$8,500.00 only, for the damages, both general and special, for which this libel was commenced.

On the appeal, the libelant desires to review only



the question of the adequacy of general and special damages awarded to libellant by the Court herein.

Dated this 20th day of June, 1956.

/s/ DAVID R. WILLIAMS

Of Proctors for Libellant,

WILLIAMS & ALLEY

Acknowledgment of Service attached.

[Endorsed]: Filed June 20, 1956.

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[Title of District Court and Cause.]

## NOTICE AND ALLOWANCE OF APPEAL

Notice is hereby given that the United States of America, the respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decree entered herein on March 23, 1956.

/s/ C. E. LUCKEY,

United States Attorney,

Proctor for Respondent United  
States of America

KRAUSE, EVANS & LINDSAY

Of Counsel to Proctor for Respond-  
ent, United States of America

The foregoing appeal is hereby allowed.

Dated at Portland, Oregon, this 20th day of June,  
1956.

/s/ WILLIAM G. EAST,

United States District Judge

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR PAYMENT OF COSTS  
ON APPEAL

Know All Men by These Presents, That we, John Farley, Libelant herein, as Principal, and Saint Paul-Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware, and authorized under the laws of the State of Oregon to become surety upon bonds, in the State of Oregon, as Surety, are held and firmly bound unto the United States of America, Respondent, and to its successors and assigns, in the above entitled Court and Cause, in the sum of Two Hundred Fifty & No/100 (\$250.00 Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, John Farley, Libelant herein, has appealed to the United States Court of Appeals for the Ninth Circuit from a decree, conclusions and findings of the District Court of the United States for the District of Oregon, made and entered on or about March 23, 1956, in the above entitled cause;

Now, Therefore, the Condition of This Obligation Is Such, That, if the above named Appellant, John Farley, shall prosecute said appeal with effect and pay all costs which may be awarded against him

as such Appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void; otherwise, same shall remain in full force and effect.

In witness whereof, the said Principal has caused these presents to be signed and executed and the said Surety has caused these presents to be duly executed by its respective duly authorized legal representatives and its corporate seal to be hereunto affixed, on this 25th day of June, 1956.

/s/ JOHN FARLEY,

Principal

[Seal] SAINT PAUL-MERCURY  
INDEMNITY COMPANY,

/s/ By D. WILSON,

Its Attorney-in-Fact,

Surety

Countersigned:

CAMPBELL & MACNAB,

/s/ By L. B. MACNAB,

Resident Agent, Residing at  
Portland, Oregon

Acknowledgment of Service attached.

[Endorsed]: Filed June 27, 1956.

[Title of District Court and Cause.]

## LIBELANT-APPELLANT'S ASSIGNMENTS OF ERROR

1. The Trial Court erred in its findings and conclusions and Decree dated March 23, 1956, with respect to an award upon the libel for damages in the following particulars:

(a) Said award of \$8,500.00 was approximately one-third ( $\frac{1}{3}$ ) of the wage loss which libelant proved he sustained between the date of injury and the date of trial.

(b) Said award of \$8,500.00 was grossly inadequate to compensate the libelant for the loss of wages, both past and to be reasonably expected in the future, and the pain, suffering and disability which the evidence proved was sustained by libelant as a result of respondent's negligence.

(c) Said award of \$8,500.00 was grossly inadequate to compensate libelant for the injuries, loss of wages, pain, suffering and disability which the Trial Court found (Findings of Fact numbered 7, 8 and 9) were sustained by libelant as a result of respondent's negligence.

(d) Under the evidence, the Findings of Fact numbered 7, 8 and 9, made and entered by the Trial Court, the Trial Court should have found libelant's full damages to be in an amount not less than \$92,000.00.



Respectfully submitted this 27th day of June, 1956.

/s/ DAVID R. WILLIAMS  
Of Proctors for Libelant,  
WILLIAMS & ALLEY

Acknowledgment of Service attached.

[Endorsed]: Filed June 27, 1956.

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that all exhibits offered or received in evidence at the trial of the above entitled case may be transmitted in their original form to the United States Court of Appeals for the Ninth Circuit, to be made a part of the record on appeal without the necessity of reproduction, excepting however, the following exhibits as to which the parties agree that photo-static copies may be substituted for the original exhibit, which original exhibit may be withdrawn and returned to the respective parties offering the same:

1. Respondent's Exhibit 7 (Rough and Smooth Log of the "SS Augustin Daly" from 0001 February 9, 1952, to 2400 April 10, 1952).
2. Libelant's Exhibit 6 (United States Department of Commerce Continuous Discharge Book for John Farley).

Dated this 20th day of July, 1956.

/s/ DAVID R. WILLIAMS  
Of Proctors for Libelant,  
WILLIAMS & ALLEY

/s/ VICTOR E. HARR,  
Assistant United States Attorney,  
Proctor for Respondent, United  
States of America

/s/ GUNTHER F. KRAUSE  
Of Counsel to Proctors for  
Respondent,  
KRAUSE, EVANS & LINDSAY

[Endorsed]: Filed July 20, 1956.

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[Title of District Court and Cause.]

### ORDER

Based upon the stipulation entered into by the counsels for the respective parties in the above entitled case,

It is hereby ordered that all exhibits offered or received in evidence at the trial of the above entitled case shall be transmitted by the Clerk of this Court in their original form to the United States Court of Appeals for the Ninth Circuit, to be made a part of the record on appeal without the necessity of reproduction, excepting however, the Respondent's Exhibit 7 and Libelant's Exhibit 6, as to which exhibits photostatic copies will be substituted for the originals and said original ex-

hibits shall be returned to the respective parties offering same.

Dated this 20th day of July, 1956.

/s/ WILLIAM G. EAST,  
District Judge

Received Libelant's Exhibit 6 this 20th day of July, 1956.

/s/ DAVID R. WILLIAMS

Received Respondent's Exhibits 7 and 7(a) this 20th day of July, 1956.

/s/ DAVID R. WILLIAMS

[Endorsed]: Filed July 20, 1956.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in personam; Exceptions; Order overruling exceptions; Answer; Pre-trial order; Order allowing parties to amend pre-trial order; Order allowing time for briefs; Respondent's brief; Memorandum opinion; Findings of fact and conclusions of law; Decree; Order dated December 22, 1955; Order setting aside findings of fact, conclusions of law and decree; Findings of fact and conclusions of law; Decree; Notice of appeal; Designation of rec-

ord on appeal; Undertaking for payment of costs on appeal; Libelant - appellant's assignments of error; Designation of record on appeal; Stipulation re exhibits; Order to transmit exhibits to Court of Appeals; supplemental designation of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7435, in which John Farley is the libelant and appellant and United States of America is the respondent and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and the appellee, and in accordance with the rules of this court.

I further certify that the reporter's transcript will be forwarded when it is received and filed in this office. All exhibits are being forwarded by the attorneys for the appellant.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 25th day of July, 1956.

[Seal] R. DE MOTT,  
Clerk

/s/ By THORA LUND,  
Deputy



United States District Court  
District of Oregon

Civil No. 7435

JOHN FARLEY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

TRANSCRIPT OF TESTIMONY

Before: Honorable William G. East, U. S. District Judge.

July 27, 28, 29, 1955. United States Courthouse, Portland, Oregon.

Appearances: Messrs. David R. Williams, Leonard D. Alley, Attorneys for Libelant; Messrs. Gunther F. Krause, Chick Chaloupka, of Attorneys for Respondent.

(Whereupon the following proceedings were had:) [1]\*

LEO M. ZALESKI

produced as a witness on behalf of the Libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): May I have your name, please?  
A. Leo M. Zaleski.

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Leo M. Zaleski.)

Q. And, where do you reside, Mr. Zaleski?

A. 7325 Southeast Insley.

Q. Portland, Oregon?

A. Portland, Oregon.

Q. And, what is your occupation or trade, Mr. Zaleski?

A. Marine engineer.

Q. You are a marine engineer?

A. Yes.

Q. What class?

A. Third assistant.

Q. I see. How long have you gone to sea, Mr. Zaleski, sailing merchant vessels?

A. Twelve years.

Q. What licenses or categories have you been in during that time? [2]

A. Well, junior third assistant, fourth assistant, acting second assistant, and third assistant, oiler, fireman, junior engineer.

Q. Do you hold a second or third assistant license at this time?

A. Yes.

Q. Marine engineer?

A. Yes, sir.

Q. And, were you employed aboard a vessel known as the SS Augustin Daly in the year 1952?

A. I was.

Q. Do you recall when the voyage commenced?

A. February 21st, I believe it was.

Q. Of 1952?

A. Uh huh.

Q. And, you say you went aboard that ship. Did you sign articles aboard her?

A. Yes.

Q. In what category?

A. Third assistant.

Q. Third assistant marine engineer?

A. Yes.

(Testimony of Leo M. Zaleski.)

Q. And, you sailed from Portland, Oregon, then, you said in February? [3]

A. Well, we sailed in March, I believe it was, when we left but I went aboard in February.

Q. From Portland, Oregon, where did you go?

A. Well, we went to Coos Bay and then we come back to Portland.

Q. What I mean, Mr. Zaleski, is when you left Portland you went to the Orient, did you not?

A. Oh, yes. Sasebo.

Q. Sasebo, Japan, is it? A. Yes.

Q. About when did you arrive there? May I ask you this question, Mr. Zaleski: About how many days did you spend crossing?

A. Well, about twenty days I believe it was.

Q. Yes. Do you know approximately what date you arrived in Sasebo, Japan?

A. No, I don't recall right now.

Q. Would it be around the first of April?

A. Yes.

Mr. Williams: I believe counsel will agree with me that Mr. Farley was injured shortly after midnight on the 6th of April which was the fifth day that the vessel had been at Sasebo, is that not correct, Mr. Krause?

Mr. Krause: Well, I don't know she could arrive on the 2nd of April and he got hurt just after [5] midnight on the 6th. Now, that doesn't look like five days to me but maybe it is.

Mr. Williams: Doesn't the log show arrival on the 1st?

(Testimony of Leo M. Zaleski.)

Mr. Krause: Well, I thought it was on the 2nd.

The Court: Well, if you can't agree let's get the log.

Q. (By Mr. Williams): At any rate, Mr. Zaleski, did you go ashore on liberty prior to the time when Mr. Farley was injured, if you can recall, in Sasebo? A. Well, I am not certain.

Q. You didn't go ashore with Mr. Farley—

A. No.

Q. —during the time there? Do you know what appliance was provided for the men to go from the deck of the vessel to the liberty launch alongside the vessel to go ashore? A. Yes.

Q. What was it? A. Jacob's ladder.

Q. Jacob's ladder. Is that sometimes referred to as a pilot ladder? A. Yes, sir.

Q. Will you describe the pilot ladder that was used, if you can recall it?

A. Well, it consists of four lines with wood rods fastened into oval—oval-shaped wooden side boards and these rods are put in them and then these [5] lines—they are set in between the two lines and then they are seized around up above and below each one of the oval disks or side boards.

Q. The ladder as such, is it flexible? A. Yes.

Q. It is not rigid? A. No.

Q. Yes. When did you first learn of Mr. Farley's injury?

A. Oh, a few minutes after it happened I heard commotion and went out to see what happened and Mr. Farley was stretched out on the deck of the



(Testimony of Leo M. Zaleski.)

launch and I asked what happened and nobody seemed to know anything right then and then a few minutes later, well, somebody said that somebody fell on him. But, I didn't know who it was that had fallen.

Q. The Jacob's ladder was there at that time, was it not?      A. Uh huh.

Q. Did you ever go down aboard the launch following Mr. Farley's injury?      A. No.

Q. To assist him or anything like that? You did not?      A. No.

Q. Now, Mr. Zaleski, you have served the last 12 years at sea, is that correct?

A. Approximately.

Q. Now, are you familiar with any practices or customs in the maritime industry with regard to [6] the use of certain types of appliances for furnishing men a means of ingress and egress to and from the vessel when shore liberty is granted?

A. Yes.

Q. Are you familiar with those practices?

A. (Witness nods head.)

Q. What type of device is customarily employed?

(At this point an objection was made by Mr. Krause and the Court sustained the objection to the form of the question.)

Q. (By Mr. Williams): Mr. Zaleski, will you first describe, if you recall, the accommodation ladder which was aboard the SS Augustin Daly?

(Testimony of Leo M. Zaleski.)

A. Well, it was a rigid wooden ladder that is made up in two sections.

Q. Will you describe how it is——

A. And——

Q. ——fastened to the vessel for use when the vessel is at anchor?

A. Well, on the main deck they have a platform which is—when the ship is at sea they pull that up and it forms part of the ship's side, the gunwales, when she is at anchor. Well, they lower that down and they fasten this one end of the ladder to it by shackles and the other end is fastened to the lifeboat falls—one of the lifeboat falls is taken off and hooked onto this ladder with [7] chains—bridle-like chains coming up and across forming an arch and this fall is fastened onto it and that holds the free end up for raising or lowering, whichever you may need to do.

Q. Is the ladder in against the side of the ship?

A. Fairly close, yes.

Q. Yes. Is there a platform, you say, on top to which the accommodation ladder is fastened?

A. Yes, sir.

Q. From that platform do you have to get over the rail or is that on the same——

A. No; that's right on the deck.

Q. I see. A. The rail swings out.

Q. Oh. There is a removing place at the rail there? A. There is a gate there.

Q. So that you don't have to climb over the rail? A. Yes.

(Testimony of Leo M. Zaleski.)

Q. Does the accommodation ladder have hand-rails on it?

A. Some have rails, some have lines.

Q. Yes. Will you describe the one on the Augustin Daly, if you recall?

A. If I recall, I think she had lines, just ropes strung down through there and fastened on one end and fastened to the ship's side—or, rather, on the ship up at the other end. [8]

Q. What device holds these ropes?

A. Well, rods—iron rods with eyes through them.

Q. Do you call them stanchions?

A. Stanchions.

Q. And, the rope goes through the stanchions to provide a handrail, is that correct?

A. (Witness nods head.)

Q. On both sides? A. Yes, sir.

Q. The accommodation ladder, did you state that it was in two pieces or in one piece?

A. I believe it was in two pieces.

Q. Two pieces. Well, approximately how long would each section be?

A. Ten, twelve feet.

Q. Ten, twelve feet?

A. (Witness nods head.)

Q. Those sections are bolted, fastened, or shackled, together in some fashion?

A. Bolted. They are movable.

The Court: You could separate them, couldn't you?

(Testimony of Leo M. Zaleski.)

The Witness: Yes.

Q. (By Mr. Williams): Do you recall where the accommodation ladder was on the vessel while the vessel was in port at Sasebo? Do you remember where it was? [9]

A. I am not sure.

Q. Do you recall the approximate draft of the vessel? I mean by that was she deeply loaded while in Sasebo?

The Court: Well, I want to know at the time of the accident not any before dates.

Mr. Williams: Well, your Honor, the question involved is a little broader than that because of the decisions to use this Jacob's ladder for a period providing shore liberty for approximately four days.

The Court: Well, all right.

Q. (By Mr. Williams): Do you recall that question, Mr. Zaleski? A. No.

Q. I will repeat it. Do you recall when the ship arrived in Sasebo if she was heavily loaded, the Augustin Daly? A. Yes.

Q. Was her cargo discharged there, some of it?

A. I believe so.

Q. What cargo, if you recall—would it be out of the holds or is it the deck?

A. I believe it was off the deck.

Q. The draft of the vessel, did it change during the time it was in Sasebo? A. Yes.

Q. She came out of the water as she was unloaded? A. Uh huh. [10]

Q. Do you know how much freeboard existed



(Testimony of Leo M. Zaleski.)

at the time of Mr. Farley's injury; that is, the distance from the water up to the main deck?

A. Well, I am not sure about that.

Q. You don't recall how far——

A. No, I don't.

Q. ——below you the liberty launch was when you looked down?

A. Might have been fifteen, twenty feet.

Q. Yes.

The Court: Well, are you just guessing?

The Witness: About fifteen feet, I would judge, by the oil that was consumed and water and so forth, on the cargo removed. It raised it up.

The Court: All right.

Q. (By Mr. Williams): Mr. Zaleski——

The Court: May I interrupt so that I can clarify a point in the opening statement?

Mr. Williams: Surely.

The Court: Do you recall whether the ladder was suspended from the point at the main deck or did it go on up to the boat deck?

The Witness: I believe it was on the main deck, as nearly as I can recall, fastened on the main deck.

The Court: All right. [11]

Mr. Williams: You Honor will find considerable conflict in various depositions on the point.

The Court: I wanted to clarify this witness' point because I understand that is quite an issue.

Q. (By Mr. Williams): Mr. Zaleski, I am going to ask your opinion on this next question based on the following assumed facts. Assume that a liberty-

(Testimony of Leo M. Zaleski.)

type vessel is in the harbor at Sasebo, Japan, and, further, that the freeboard of the vessel at this particular time is approximately fifteen feet. I will ask your opinion as to whether under those circumstances a Jacob's ladder is a safe means by which to provide shore liberty for a crew?

The Court: Don't answer the question.

(At this point an objection was made by Mr.

Krause and the Court sustained the objection.)

Q. (By Mr. Williams): Mr. Zaleski, at the time in question when Mr. Farley was injured would you describe the place in the harbor where the SS Augustin Daly was; that is to say, was it out in the open sea or was it in behind the breakwater or in a harbor of some kind?

A. Oh, it was in a very well sheltered harbor.

Q. And, what was the condition of the water around there, was it rough or smooth?

A. Smooth.

Q. The Jacob's ladder that you have previously [12] referred to which was employed aboard the Augustin Daly, is that a standard type of Jacob's ladder or pilot ladder——

A. Yes.

Q. ——customarily employed? A. No.

Q. It is not? In what respect is it different?

A. Well, I will—what do you mean "customarily employed"? You mean——

Q. I mean whether used at all?

A. Oh, yes. Well, it is the customary Jacob's ladder.

Q. All right. I am going to ask you for your

(Testimony of Leo M. Zaleski.)

opinion on this question based on the following assumed facts. Assume that shore liberty is to be given various crew members aboard a liberty-type vessel which is anchored in a sheltered harbor where the water is smooth. I will ask your opinion whether or not under those circumstances is a Jacob's ladder a safe and proper appliance to be used for affording men ingress and egress to and from the ship for shore liberty?           A. No.

(Whereupon an objection was made by Mr. Krause which was sustained as to the form of the question by the Court.)

Q. (By Mr. Williams): Mr. Zaleski, I will ask you the following hypothetical and your opinion thereon based upon these assumed facts. Assume [13] that a shore leave is to be given to the crew members aboard a liberty-type vessel which is anchored in a protective harbor in smooth water; further assume that at the particular time in question that the standard form of Jacob's ladder such as you have previously described is to be used and that it is nighttime, approximately midnight; and, further, that a form of lighting is provided on the deck of the vessel which gives some light over the edge or gunwale of the vessel. I ask you whether or not under those circumstances which you are asked to assume, is a Jacob's ladder a fit and proper appliance to provide ingress and egress to the crew in going to and returning from shore liberty?

(Testimony of Leo M. Zaleski.)

The Court: Please don't answer the question until counsel has had a chance to object.

(Whereupon Mr. Krause objected and upon the Court's suggestion the hypothetical question was held in abeyance until one of the facts contained in the question was cleared up.)

Q. (By Mr. Williams): Mr. Zaleski, do you recall the lighting which was there on the side of the ship at the time of Mr. Farley's injury? What sort of lighting was available?

A. Well, I believe—I believe we have one of the boat lights and a cargo lamp.

Q. And, what sort of light would that provide or do you know? [14]

A. Well, it's about 800 watts, I think it was.

Q. Where would the light shine?

A. Well, one was directed from the after end of the boat deck and the other was from the forward end and it was aimed at the Jacob's ladder or in that area.

Q. Did it afford some light on the Jacob's ladder? A. Yes.

Q. Was it bright or somewhat in darkness or what would you say?

A. Well, I wouldn't call it bright nor dark. Well, kind of dim.

Q. What sort of light was available on the deck of the liberty launch?

A. Only what come from the lights that was illuminating the water.

Q. Yes. Mr. Zaleski, can you recall the assumed



(Testimony of Leo M. Zaleski.)

facts which I gave you in this last question? Perhaps I had better repeat them. Would you please give your opinion based upon the following assumed facts? Assume that a liberty vessel is anchored in a protective harbor where the water is smooth; further assume that the lighting provided is a cargo light and some sort of a floodlight which throws light on a Jacob's ladder which is there employed; that the light which it throws on the Jacob's ladder is somewhat dim and that no light is available on the liberty launch itself other than [15] that provided by the light from the liberty ship. Assume further that the time is approximately midnight. I will ask your opinion under those assumed facts whether or not a Jacob's ladder—a standard form of Jacob's ladder such as that which you have previously described is a safe means to afford the crew members ingress and egress to the vessel when returning from shore liberty or going ashore? A. Well, no.

Q. Your answer is "no"?

A. (Witness nods head.)

Q. Why do you say that?

A. Well, there are several reasons. A Jacob's ladder is—being flexible, they're not the easiest things to climb and anybody who has—unless they have done a lot of climbing on them can very easily get hurt or if they have packages in their hands, which most of them generally do, well, it's pretty difficult to climb up and you can't never tell about the lines securing it.

(Testimony of Leo M. Zaleski.)

The Court: Line security?

The Witness: Pardon?

The Court: Did you say the line?

The Witness: The securing—the line where they are secured onto the deck.

The Court: I see. That isn't at issue in this case, is it? [16]

Mr. Krause: Not that I know of.

The Court: There isn't any issue?

Mr. Williams: No.

The Court: The Court will disregard it.

Mr. Williams: I wish it would.

Q. Mr. Zaleski, where would a man who was climbing a Jacob's ladder if he was to, for some reason, become dislodged from the ladder, fall?

A. Well, he has got a pretty good chance of falling on the launch or into the water.

Q. Or on another crew member? A. Yes.

Q. Mr. Zaleski, what is a Jacob's ladder customarily employed for?

A. For pilots coming aboard and going ashore; sometimes for custom agents or the doctors, quarantine officers.

Q. Do one or more members of the ship's crew sometimes use the ladder for specific tasks ashore?

A. Well, sometimes they might go down onto the stagings by the Jacob's ladder.

Q. Do you mean to do some work on the vessel?

A. Yeah; on the ship's sides; painting the side of the ship. They might lower a Jacob's ladder to go down.

(Testimony of Leo M. Zaleski.)

Q. When the vessel is taking on oil is it sometimes necessary to use one for some purpose? [17]

A. Well, they can sometimes. Sometimes the oil barge will have a regular stepladder they will land up against the side of the ship.

Q. Does the use of the Jacob's ladder for certain specific purposes, is that sometimes required of certain of the members of the engine room of the vessel?

A. Well, outside of only the chief engineer going down to check on his oil that would be about the only time we would use one.

Q. To measure oil?

A. Yeah; check the soundings on the barge.

Q. Is there any purpose aboard the vessel whereby someone, a member of the steward's department would use the Jacob's ladder?

A. None that I would know of.

Q. Is a Jacob's ladder easy to climb or difficult to climb?

A. Well, they're kind of difficult. Some work a little better than the others, it depends on its age.

Q. Mr. Zaleski, does the work of a second assistant marine engineer aboard a vessel require heavy laborious work lifting and that sort of thing?

A. At times, yes.

Q. Then, it is your testimony it does not require it constantly, is that correct?

A. No. [18]

Q. Just occasionally?

A. (Witness nods head.)

(Testimony of Leo M. Zaleski.)

Q. Mr. Zaleski, when members of the crew are on shore leave, that is to say, they have left the ship or have not returned to it, who is in command of a liberty launch if one is provided for the convenience of the men going and coming ashore?

A. Nobody besides the skipper of the launch.

Q. You mean the person who owns the launch employed to run it? Is it your testimony that all of the men are of equal rank when they are on shore liberty? A. Yes.

Mr. Krause: Well, just a moment, your Honor. He hasn't so testified and I don't think counsel should lead him.

The Court: That is a perfect leading question.

Mr. Williams: I realize that. I withdraw the question.

Q. Mr. Zaleski, you have testified, have you not, that no one is in charge of such a liberty launch?

A. No.

Q. That was your testimony, wasn't it?

A. Uh huh.

Q. How many departments does a liberty ship have? A. Three.

Q. Are you referring to licensed or unlicensed?

A. Well, everything. Engines, stewards, and deck. [19]

Q. Engine, steward, and deck? A. Uh huh.

Q. They have licensed and unlicensed men in each of those departments?

A. All except the stewards.

Q. Beg your pardon?



(Testimony of Leo M. Zaleski.)

A. All except the stewards department.

Q. They have no licensed personnel?

A. No licensed personnel.

Q. Is there a department for radio men also?

A. Yeah.

Q. When a liberty launch returns with a crew to the side of a vessel is there someone in that launch or is there someone on the deck of the vessel in charge of the boarding of the vessel?

A. No.

Q. There is no one in charge?

A. (Witness shakes head.)

Q. What I mean, Mr. Zaleski, is there a sailor or someone else on so-called gangway watch when the liberty ship returns to the vessel?

A. Sometimes.

Q. Mr. Zaleski, do you know what the pay scale of a second assistant engineer is at the present time?

A. I believe it is \$506 a month. [20]

Q. And, do you know what overtime rate would be applicable to this overtime employment?

(At this time Mr. Krause objected, suggesting that the records available in the case would be the best evidence of the rates of pay.)

Q. (By Mr. Williams): Mr. Zaleski, when a Jacob's ladder is climbed where would you say the most hazardous point on the ladder is when you are going—ascending the ladder from a lighter or liberty launch to the vessel?

(At this time Mr. Krause objected.)

(Testimony of Leo M. Zaleski.)

Q. (By Mr. Williams): Well, I will ask you, Mr. Zaleski, what does a seaman do when he climbs a ladder — a Jacob's ladder going from a liberty launch to the deck of a vessel?

A. Oh, well—what do you mean by "What does he do"?

Q. What action does he take? Describe his ascent up the ladder.

A. Well, some of them when they go they use the sides.

Q. To hold on to?

A. Yeah. They use the sides of the ladder.

Q. Yes. A. Others use the rungs.

Q. Yes. To hold on to?

A. To hold on to, to pull themselves up as they——

Q. What happens when they get to the top?

A. Well, sometimes you get a problem. You will have to reach around over the gunwale and then pull yourself the last couple of steps.

Q. But, the ladder is hooked over the rail?

A. Yeah.

Q. And, you are getting off there?

A. You ain't got nothing to hold on to.

Q. You don't have anything to hold on to, is that—— A. No; just the rail.

Q. Yes.

A. You would almost have to leapfrog over.

Q. Now, suppose that you were going to get off at some midway point on that ladder as, for example, if it were hooked up to the rail on the

(Testimony of Leo M. Zaleski.)

boat deck and you were going to get off on the main deck how would you get off on the main deck?

A. Well, you would have to step off, climb up to even to the rail and then step off over onto the rail.

Q. Step around the edge of the ladder?

A. Yes.

Q. Whereas a Jacob's ladder fastened — is it fastened at more than one point on the vessel, that is to say? A. Generally, no.

Q. Then, it hangs free from the point where it is fastened at the top? A. Uh huh. [22]

Mr. Williams: I believe that's all, your Honor.

The Court: Cross examination?

#### Cross Examination

Q. (By Mr. Krause): Mr. Zaleski, how long have you held your second engineer's license?

A. I don't have a second. I have a third.

Q. A third assistant? A. Assistant.

Q. How long have you held that?

A. It will be ten years in April.

Q. How much of that time have you served as a third assistant or as any licensed engineer?

A. Oh, approximately six years.

Q. A part of that time you were serving as a junior engineer who requires no license, is that right? A. No. No.

Q. You have held either a third assistant or better for about ten years; that is, you have had

(Testimony of Leo M. Zaleski.)

your license as a third assistant for ten years but you have served as a third assistant or higher?

A. Yes.

Q. Acting second for about six of the ten years?

A. Yes.

Q. When were you last at sea? [23]

A. Two weeks ago Friday.

Q. Are you now a member of a crew of a vessel?

A. No. I am relief engineer now.

Q. You are a relief engineer? A. Yes.

Q. A relief third assistant?

A. No; night engineer.

Q. Night engineer? A. Yeah.

Q. This last voyage was that a trans-Pacific voyage that you made? A. Yes, sir.

Q. The last voyage from which you returned about two weeks ago? A. Uh huh.

Q. Did you, while you were out this last time, anchor in any Japanese harbor, any foreign harbor over there? A. No.

Q. You were always at a dock? A. Yes.

Q. Have you at any time other than when you were on this Augustin Daly anchored in a harbor where the deck cargo was being discharged over the side? A. Yes.

Q. You have? [24]

A. (Witness nods head.)

Q. You have seen the Jacob's ladder used for getting aboard and off of a vessel when it is at anchor in a harbor, have you not? A. Yes.

Q. Aside from the crew members about how



(Testimony of Leo M. Zaleski.)

many longshoremen were boarding and leaving the ship each day?

A. Oh, I couldn't tell you. I don't know.

Q. You could give us no estimate of the number of longshoremen?

A. Oh, possibly twenty-five.

Q. Approximately twenty-five?

A. (Witness nods head.)

Q. They came aboard the ship by the Jacob's ladder too, didn't they?

A. Yes.

Q. They left again the same way?

A. (Witness nods head.)

Q. On the Augustin Daly this Jacob's ladder was the only method provided for getting on board and going off?

A. Yes.

Q. Now, Mr. Zaleski, do you have any straight-up-and-down ladders in the engine room of the vessel?

A. Two.

Q. Two of them. What are their heights approximately? [25]

A. Well, one of them is about seven feet and the other one is about fifty feet.

Q. One of them is seven or eight feet and the other is about fifty?

A. (Witness nods head.)

Q. Have you climbed them at times?

A. Yes.

Q. When your hands were covered with oil, greasy?

A. Yes.

Q. Are these steps usually covered with oil and greasy in the engine room?

A. Generally.

(Testimony of Leo M. Zaleski.)

Q. You climbed up and down those ladders, though, did you?      A. Yes.

Q. Now, we will return to the pilot ladder. Is that at all comparable to this ladder in the engine room?      A. Well, yes and no.

Q. In your opinion which is more dangerous to climb, the pilot ladder or this ladder in the engine room?      A. The pilot ladder.

Q. The pilot ladder?      A. Yes, sir.

Q. Although the pilot ladder has two rungs whereas your steel ladder in the engine room has one steel bar?      A. No; we have two. [26]

Q. What?      A. Two.

Q. You also have two steel bars?      A. Yes.

Q. This pilot ladder whenever you used it was free of grease and dirt, wasn't it?      A. Yes, sir.

Q. With the light there that you saw that night each step was perfectly visible, wasn't it, to a man on the ladder?      A. I believe.

Q. That is, a man climbing the ladder could see every step as he stepped up to it?      A. Yes.

Q. When you looked over the side you were able to see Mr. Farley lying on the deck of the launch about fifteen feet below, were you not?

A. Yes.

Q. You recognized him, didn't you?

A. Well, I couldn't recognize his features.

Q. You couldn't recognize his features?

A. No; but, build and——

Q. Now, I suppose before you ever went to sea

(Testimony of Leo M. Zaleski.)

you climbed up and down ladders, didn't you, Mr. Zaleski?      A. Yes.

Q. Around the places on which you were, farms, [27] and so on, there were some straight-up-and-down ladders too, weren't there?      A. Yes.

Q. You climbed them all right?      A. Yes.

Q. Now, Mr. Zaleski, just tell us or, itemize for me now the reasons why a pilot ladder or Jacob's ladder is not safe. You mentioned one or two before. What is it, men would be coming back carrying packages when they went up?      A. Yes.

Q. Do you carry packages up and down the Jacob's ladder when you are going up and down?

A. I have only climbed up a couple of them.

Q. You have only climbed up a couple of Jacob's ladders?      A. Yes; with packages.

Q. Did you carry packages with you?

A. Yes.

Q. Did you ever carry a couple of bottles of whiskey at the same time?      A. No.

Q. Have you also seen the men attach their packages to a heaving line when they go up the ladder instead of carrying them?      A. Yes.

Q. You wouldn't say, I suppose, that having [28] your hands encumbered when you go up a ladder is a safe thing to do, would you?

A. No.

Q. Is that the reason that you say that a Jacob's ladder is unsafe because people sometimes have packages in their hands?

A. Well, for that and that it's not the easiest

(Testimony of Leo M. Zaleski.)

thing to hang on to in order to navigate going up because of its flexibility.

Q. Well, it would be easier for you to walk up a regular stairway than going up a ladder, wouldn't it? A. Yes.

Q. Does that make it safer to go up the stairway than the ladder? A. Yes.

Q. It does? A. (Witness nods head.)

Q. Because a man coming drunk and going up the stairway would probably not get hurt whereas if he was drunk and tried to go up that Jacob's ladder he might get hurt, is that the other reason? A. Yes.

Q. All right. Now, then, how was the Augustin Daly discharging her cargo on this night between the 5th and 6th of April, 1952? [29]

A. I believe she was discharging into the water.

Q. Discharging to what?

A. Into the water.

Q. Yes. She was discharging at the water. And, there were long pilings — creosoted pilings, were there not?

A. I believe so. There were some.

Q. Heavy bridge timber, do you recall them——

A. Yes.

Q. —that were on the deck?

A. (Witness nods head.)

Q. This cargo was all Army cargo, wasn't it?

A. Yes.

Q. They were discharging that over the side?

A. (Witness nods head.)



(Testimony of Leo M. Zaleski.)

Q. Now, when they are discharging piling and timbers into the water over the side do they have an accommodation ladder out while that is being done? A. Generally, yes.

Q. They generally do? A. Yes, sir.

Q. On the same side that they are putting the piling into the water? A. Yes.

Q. Yes. There is no danger of damaging the accommodation ladder when they are doing that, is there? A. A little but not much. [30]

Q. These pilings, were they being made up into rafts alongside the vessel? A. I believe so.

Q. Yes. And, the timbers were also being made up into rafts alongside the vessel, weren't they?

A. Yes.

The Court: I think this is a good place to interrupt.

Mr. Krause: Oh, yes, your Honor.

(Whereupon the Court recessed for the lunch hour.) [31]

(Court convened at 3:00 P.M., July 27, 1955, pursuant to adjournment.)

The Court: We had Mr. Zaleski on the stand, I believe.

(Whereupon, Mr. Zaleski resumed the stand as a witness.)

Cross Examination—(Continued)

Q. (By Mr. Krause): Mr. Zaleski, how many renewals of your license have you had? A. One.

Q. Well, then, they run for five years each time?

(Testimony of Leo M. Zaleski.)

A. Yes, sir.

Q. So, you are on your——

A. Second license.

Q. ——second license now? Has that nearly run its five-year term? A. Yes, sir.

Q. Do you recall the date of your license?

A. I believe it's April 26th. I have got it right here.

Q. You may look at it if you wish.

A. The 30th of April—no. 12th of April, 1951.

Q. Then, it has another year to run——

A. About——

Q. ——to make up your ten years on the license?

A. (Witness nods head.) [32]

Q. Was this voyage of the Augustin Daly the only one that you have made to ports where the vessel anchored out in the harbor?

A. I don't quite understand you.

Q. This one voyage of the Augustin Daly, was it the only one in which you were on a ship that anchored in the harbor to discharge cargo?

A. Oh, no.

Q. You have been on other ships that did that?

A. Yes, sir.

Q. Both before and since? A. Yes, sir.

Q. Were they discharging cargo over the side into the water too other than the—— A. Yes.

Q. Augustin Daly? A. Yes.

Q. Now, can you tell us what the duties of the engineer officers are outside of the immediate work of operating and keeping the engines in repair?

(Testimony of Leo M. Zaleski.)

A. Oh, that's about the limit of them. He has a certain amount of responsibility as far as the crew goes but it is limited to—well, extreme—well, emergencies or something like that. But, on the whole you do—after you have done your work that is as far as your responsibility goes. [33]

Q. Well, you are on duty four hours on and four hours off when you are at sea?

A. Eight hours off.

Q. Yes. Oh. Four hours on and eight hours off when you were at sea?

A. Yes.

Q. So, outside of doing your work during those watch hours you have no duties?

A. None.

Q. None?

A. (Witness shakes head.)

Q. You have no responsibilities towards the safety of the ship, the cargo, or the members of the crew, when you are not on watch?

A. Well, everybody has that. That's—

Q. Well, now, you see, I asked you to give us the duties of the licensed officers of a ship, particularly the second assistant engineer. Now, what duties does he have towards this crew, toward the cargo, and toward the ship, other than standing his watches?

A. Well, none unless they are trying to damage the vessel or the cargo.

Q. Well, then, when you say "none unless they're trying to damage the cargo or the vessel"—

A. Yes. [34]

Q. When an engineer officer sees a member of the crew doing some negligent act that might result

(Testimony of Leo M. Zaleski.)

in the crew man's own injury the engineer officer has no duty?      A. Legally, no.

Q. Well, you don't have to give us the law, Mr. Zaleski, now. As an officer of the ship do you consider that the officer has any duty with respect to a crew man who is doing a negligent act that is apt to injure him?      A. To a certain degree.

Q. Well, what would the duty of the engineer be if he sees a member of the crew doing something that is plainly negligent and might result in that man's injury?

A. Well, if the person involved has any conscience, well, he might try to do something to stop him but if he doesn't you let him go and let him learn the hard way.

Q. All right. That is, then, the officer does not have a duty to try to prevent injury to a member of the crew?

A. No, I wouldn't say that he would be bound to it.

Q. Well, Mr. Zaleski, doesn't he either have a duty or he doesn't have a duty?

Mr. Williams: Your Honor, I wish to impose an objection to Mr. Krause's interrogation when he says "an officer" unless he refers to the type of officer. He has referred from time to time——

The Court: I think you are entitled to ask the witness. [35]

Mr. Williams: There is a vast difference between them.

Q. (By Mr. Krause): I thought I had referred



(Testimony of Leo M. Zaleski.)

to a second assistant engineer—— A. Uh huh.

Q. ——on the *Augustin Daly*? Do you, first of all, know what the duties of the second assistant engineer are? A. Yes.

Q. You do? A. Yes.

Q. All right. Now, then, does the second assistant engineer have a duty with respect to a crew man, a member of the crew of the vessel, to warn him when he is doing something negligent that might result in the man's injury? A. Yes.

Q. He does? Now, if this negligent crew man is doing something that might result in injury to others of the crew does he have the same duty to warn him?

A. Well, I wouldn't necessarily call it a duty, I would put it on the same basis that if you seen somebody running across the street in front of a car it wouldn't be necessarily your duty to warn him.

Q. All right. There is no duty in that case, you're right. A. Yes.

Q. Therefore, you would say that the second assistant has no duty towards his crew men either?

A. Yes.

Q. All right. Now, does the second assistant have a duty to protect the ship against injury outside of his watch? A. I believe so.

Q. You believe he does?

A. (Witness nods head.)

Q. He would have a duty to protect the ship against injury but not a member of the crew?

(Testimony of Leo M. Zaleski.)

A. No.

Q. Yes. Now, is there any rule aboard ship regarding standing under things that might fall down on you from above? A. No.

Q. There is no rule?

A. (Witness shakes head.)

Q. There is no rule not to stand out from under loads of cargo or things of that sort?

A. None that I know of.

Q. Is it the practice of men aboard the ship to stand under things that can fall on them?

A. Sometimes it's unavoidable.

Q. All right. Now, can you tell us whether there is any rule with respect to standing at the foot of a ladder while another man is climbing?

A. Well, there again it might be unavoidable.

Q. Well, my first question was is there any rule about [37] standing—— A. No.

Q. ——in the clear? A. No.

Q. You don't know of any such rule. Then, let me ask you whether or not that is a reasonably safe place for a man to be standing under a ladder while another man is climbing? A. Not necessarily.

Q. It is not necessarily safe or unsafe?

A. Well, it can be both.

Q. Well, don't you have any view on it at all, Mr. Zaleski, one way or the other?

A. Well, sure; it depends on the conditions.

Q. Well, you saw the conditions of this pilot ladder and the liberty boat, the lighting, and so forth, on the night that Mr. Farley was hurt?

(Testimony of Leo M. Zaleski.)

A. (Witness nods head.)

Q. Now, you know the ladder and all of the conditions, you saw them and you have described them to us. Now, will you tell us whether that is a reasonably safe place for a man to stand at the foot of a ladder under those conditions?

A. Well, I would say it was.

Q. It was?

A. In one respect that when you are going up them Jacob's ladders from a launch there is generally one man holds the [38] ladder for the other one to go up, keep it stabilized.

Q. Well—— A. And——

Q. Well, that didn't happen to be a part of this case, Mr. Zaleski, as far as I know. No one has claimed so far that Mr. Farley was holding the ladder for the man going up ahead of him and therefore you can leave that out. A. Uh huh.

(At this point Mr. Williams made an objection and then withdrew it pursuant to the Court's explanation of the matter.)

Q. (By Mr. Krause): Assuming, then, Mr. Zaleski, that there wasn't any occasion for anyone to hold the ladder at the bottom what do you say as to whether that is a reasonably safe place for a man to stand, then, within four or five feet of the bottom of the ladder?

A. Well, I would say four or five feet away from it, yes.

Q. That is safe. How close could a person stand where it would not be safe then?

(Testimony of Leo M. Zaleski.)

A. Well, right up agin it.

Q. Right up agin it. When a man falls down from the ladder does he fall usually straight down or out from the ladder?

A. Well, now, I don't know. I have never seen a man fall off up there. [39]

Q. You don't know. All right. Now, I think you said in your direct testimony that when the men are coming back from shore it is usual that someone has been drinking? A. Yes.

Q. Did you testify to that?

A. (Witness nods head.)

Q. Yes. On this night when the men had been at liberty in Sasebo it was to be expected that when they returned that some of them would have been drinking, is that right? A. Yes.

Q. All right. Do the men also usually pick up some things that they are bringing back to the ship with them? A. Some of them.

Q. You testified to me carrying packages up the—— A. Uh huh.

Q. ——pilot ladder?

A. (Witness nods head.)

Q. Is that a common thing when they are returning from liberty under those circumstances?

A. Yes.

Q. They don't usually bring packages back?

A. Oh, they bring packages back but generally don't use the Jacob's ladder.

Q. Oh. But, they don't usually have to go up a Jacob's ladder? [40]



(Testimony of Leo M. Zaleski.)

A. No. They have a regular accommodation ladder or gangway.

Q. A gangway when the vessel is anchored out in the stream?

A. Well, that's what they call it, accommodation ladder or gangway.

Q. But, a gangway is something different than an accommodation ladder? A. Yeah.

Q. A gangway is used when you can land one end of it on the dock or on some other floating object.

A. Well, you can do that with the accommodation ladder too.

Q. That is, you can rest——

A. Yes, you can rest it if you're on the dock. You use your accommodation ladder and just set it right on the dock.

Q. All right. But, at any rate, a gangway is not used when you are lying out in the harbor, is that right? A. Well, yes.

Q. How would they use the gangway then?

A. Well, in the same way, they hook it on to your platform and hold the bottom end up with the lifeboat falls.

Q. Are ships equipped with that type of a gangway that you have seen?

A. Some are and some aren't. There are different types.

Q. Now, then, if you will assume that these men returning from shore that some of them would probably have been drinking and that some of them

(Testimony of Leo M. Zaleski.)

would be returning with packages, do [41] you still regard this position four or five feet from the base of the ladder a safe place to stand while another man is going up the ladder?      A. Uh huh.

Q. You do? Mr. Zaleski, have you ever been warned by other officers on the ship when you were there to stand out from under a load?      A. No.

Q. Of cargo?      A. (Witness shakes head.)

Q. Or any other heavy weight that was being lifted?      A. No.

Q. You never have been warned to stand out from under?      A. No.

Q. Have you ever been warned to stand out from under a ladder when other men were going up the ladder?      A. No.

Q. You signed the articles on this voyage, did you not?      A. Yes.

Q. Did those articles have any provision regarding bring intoxicating liquors aboard the vessel?

A. I think all they say is about grog.

Q. I beg your pardon?

A. I think all they say is there will be no grog allowed aboard. [42]

Q. Well, is whiskey an intoxicating liquor, or grog?      A. Technically, no.

Q. Technically it isn't? What is grog, technically?

A. Well, it's supposed to be spirits and sugar and water.

Q. Spirits. Is that alcohol?      A. I guess.

Q. Sugar and water?

(Testimony of Leo M. Zaleski.)

A. I don't know, I never had any grog so I couldn't actually——

Q. Well, at any rate, when you are signing these articles it's your understanding that grog means what you have just told us now? A. Yeah.

Q. And, it doesn't refer to other intoxicating liquor?

A. Well, the word itself doesn't but that's kind of an unwritten law that it's not supposed to be brought aboard.

Q. Now, does the second assistant engineer have any duty to enforce that portion of the articles?

A. I don't believe so.

Q. Have you as third assistant engineer participated in searching crew's quarters for intoxicating liquors? A. No, sir.

Q. You have seen it done by other officers, though, have you?

A. I don't believe I have. I can't recall of any ship that [43] I have been on that they did shake it down for whiskey or beer or anything.

Q. You didn't see them searching the vessel for intoxicating liquor? A. No.

Q. As far as the second assistant engineer is concerned you would say the same thing that he had no obligation to—— A. Yes.

Q. ——see that the crew did not bring intoxicating liquor aboard? A. Yes.

Q. Mr. Zaleski, you understand that a ship owner or an operator of a ship has some obligations to protect the crew against injury, don't you?

(Testimony of Leo M. Zaleski.)

A. Yes.

Q. This vessel was owned by the United States so the United States couldn't be on the ship. Now, who of the officers of the ship had the obligation of seeing that the crew members were protected against injury?

A. Well, primarily I would say the captain.

Q. The captain?

A. Yes. In him would rest all the decisions for the men's welfare and safety and that and he would have to pass orders on down to his mates and so forth.

Q. As to what facilities used, you mean? [44]

A. Uh huh.

Q. Then, you say it was the captain's obligation to determine what sort of facilities were to be used for the crew to get on and off the ship? A. Yes.

Q. Yes. Now, outside of that, then, if any of the crew members are doing something negligent outside of the immediate men that are on the second assistant's watch would the captain be the only one that is to look after the safety of the men?

A. No; the deck officer on watch.

Q. The deck officer on watch? A. Uh huh.

Q. So, as to the men that were climbing this ladder, if any of them were doing something negligent that might result in their own injury or somebody else's injury, the only person, then, that had any obligation to look after that was the deck officer on watch? A. I believe so.

Q. Any second assistant engineer in the boat that



(Testimony of Leo M. Zaleski.)

was actually in a position to see it, he had no duty?

A. No, I don't think so.

Q. You don't think he had any duty?

A. (Witness shakes head.)

Mr. Krause: I think that's all.

The Court: Redirect? [45]

(At this point a discussion was had concerning the blueprint of a liberty vessel.)

### Redirect Examination

Q. (By Mr. Williams): First, I would like to have the log handed to the witness, please. The rough log will do, Exhibit Number 7. Will you refer to date of Sunday, April 6, 1952?

A. April 6th?

Q. Yes. Do you find that? A. Yeah.

Q. Have you that page, Mr. Zaleski?

A. Uh huh.

Q. Can you tell me what the mean draft of the vessel is on that date? Do you find that?

A. Twenty-three feet, three-and-a-half inches.

The Court: I'm sorry, I couldn't hear.

The Witness: Twenty-three feet, three-and-a-half inches.

The Court: Twenty-three——

The Witness: Three and a half.

The Court: Thank you.

Q. (By Mr. Williams): Mr. Zaleski, will you refer to the date immediately preceding that, April 5th, and give us the same information, the mean draft of the vessel?

(Testimony of Leo M. Zaleski.)

A. Well, we got two of them. At eight A.M. it was [46] twenty-three feet, two inches; and at nine P.M. it was twenty-three feet, three-and-a-half inches.

Q. This is on Saturday, April 5th? A. Yes.

Q. Now, now that you know what the mean draft of the vessel is can you compute the amount of freeboard on that vessel from the blueprint which you have before you?

A. Yeah; but I got to have a pencil and paper.

(Whereupon the witness was furnished with pencil and paper.)

The Witness: Afraid I can't do it. She don't figure right.

Q. You are unable to do it?

A. No. From the prints here it don't seem to come out. It's supposed to be one-sixteenth to the foot and you got twenty-three foot draft.

Q. It would be twenty-three sixteenths, I presume?

A. Well, we almost got the decks awash.

Q. I beg your pardon?

A. To get a twenty-three foot draft on this thing here I almost got the decks awash.

Q. Are you certain your measurements are in the right place?

A. No. I am measuring in the right place.

Q. Well, if you are unable to do so I won't question you further concerning that. But, are you able to give the [47] distance from the chart of the

(Testimony of Leo M. Zaleski.)

so-called house section of the ship, bridge section, the width of it?

A. About seventy-four feet, seventy-five feet.

Q. Between seventy-four and seventy-five feet. That is the distance fore and aft on the house section of the ship? A. Yes.

Q. Can you indicate to the Court what you are measuring there from the chart? Would you please do that? Will you hold it up so that the Court can see it?

A. From this point right here (indicating) which is the forward bulkhead of the house to the aft bulkhead of the house.

Q. Ahead of that point there are hatches, are there not, and cargo booms ahead of the house section? A. Yes.

Q. And, astern of it there are cargo booms and hatches also, are there not? A. Yes.

Q. And, is it possible to swing cargo over the house section of the ship? Is that done?

A. No.

Q. Then, it is swung out approximately parallel to where the booms or the hatches are, is that correct? A. Yes.

Q. Now, where is the position on the ship, the recess that [48] you spoke of and platform for the accommodation ladder?

A. Well, that would be——

Q. Will you point it out so the Court can see it, Mr. Zaleski?

(Testimony of Leo M. Zaleski.)

A. Approximately here (indicating). Approximately here (indicating).

Q. Will you describe where you are indicating?

A. Well, it is——

Q. How far aft of the front bulkhead?

A. Oh, about ten feet.

Q. Aft of it?

A. Front bulkhead, forward bulkhead.

Q. And, that same recess is on either side of the ship both port and starboard for the accommodation ladder? A. Yes.

Q. Which way does the accommodation ladder go down? A. Towards the stern of the ship.

Q. Goes to the stern. In your opinion, Mr. Zaleski, would it be possible for cargo loads to drop on the accommodation ladder when it is rigged in that position?

A. Well, I have never seen it happen.

Q. Well, the cargo would not be directly overhead, would it? A. No.

Q. Would the same apply to the booms in the—aft of the house section? [49] A. Yes.

Q. The house section there is where either the Jacob's ladder or the accommodation ladder is customarily placed? A. Uh huh.

Q. In this case was the Jacob's ladder placed in that general area?

A. Yeah; it was just—as well as I can remember it was just forward of that recess for the accommodation ladder.

Q. Yes. Now, Mr. Zaleski, when an accommo-



(Testimony of Leo M. Zaleski.)

ation ladder is being used is it just as easy or more difficult to get over the rail of the ship than it is with a Jacob's ladder, that is?      A. No.

Q. You arrive at the rail, what is the problem there?      A. You have to climb up the rail.

Q. With which ladder?

A. With the accommodation ladder you don't have to.

Q. You don't have to climb over the rail?

A. No.

Q. What do you do?

A. Well, you got that door or gate.

Q. A door through the rail?

A. Yes; a section of it swings out.

Q. Is there also a platform there that you alight on before you go through this recess in the gate——

A. Yes, sir.

Q. ——to get to the deck? Mr. Zaleski, Mr. Krause asked you previously whether or not you thought that the straight-up-and-down ladders you have in your engine room are as safe or some question concerning the comparative safety of that type of ladder with a pilot ladder. And, if I am not incorrect I believe your testimony was that the pilot ladder was not as safe as the engine-room ladder, the straight-up-and-down one?

A. Yes, sir.

Q. Why do you say that?

A. Well, you got something solid to hang onto.

Q. What is the ladder material in the engine room?      A. Steel.

(Testimony of Leo M. Zaleski.)

Q. It is a steel ladder?

A. (Witness nods head.)

Q. Rigid? A. Yes, sir.

Q. You use that type of ladder frequently in the engine room? A. Well, not frequently, no.

Q. Is that the regular means of getting in and getting out of the engine room? A. No.

Q. Do you use the ladder for specialized purposes? A. Yes. [51]

Q. What are they?

A. Well, you might have to get up in the boiler room fiddley to make some repairs for painting; and, some of the other ones, to get up on top of the settlers for sounding in the settlers.

Q. Mr. Zaleski, how is an accommodation ladder rigged when the draft of the vessel is such that the steps of the accommodation ladder would be inclined to be not flat but at an angle?

A. Well, they generally take a plank and nail cleats on it or other pieces of wood, maybe, a foot, fourteen inches apart and they lay them across the steps and then on the underside they also put another cleat so that the plank won't slide; keep it secure. And on that one section it happened to be laying straight out where the steps would be perpendicular, well, they put that plank across them then the other section they leave her hang down, form a kind of an L-shape at an angle.

Mr. Williams: Your Honor, do you feel that some assistance could be given this matter by the use of a blackboard by the witness to describe this?

(Testimony of Leo M. Zaleski.)

The Court: Does the Clerk have a large paper?

Mr. Williams: I believe he could perhaps indicate it on that blackboard right there.

The Court: Well, that doesn't become part [52] of the record. There is no way of putting the blackboard in evidence. What do propose to have the witness diagram?

Mr. Williams: I propose to have him show Your Honor the rigging of an accommodation ladder when the draft of the vessel is such that the steps might not be flat; in other words, that the draft were shallow.

As Mr. Krause mentioned in his opening statement, that is one of the things relied upon by the respondent. I wish to have him show and overcome the effect.

The Court: All right. I will permit it at this time.

Mr. Williams: May I advance beyond the counsel table for a minute?

The Court: Yes, you may.

Q. (By Mr. Williams): Mr. Zaleski, can you start by drawing a straight line indicating the rail of the vessel and then make a cut out on it which would be the entryway through the rail where the accommodation ladder platform would be? Then, from that——

(Whereupon the witness draws on the blackboard as requested.)

Q. (By Mr. Williams): Will you draw the water in there with a curvy line?

(Testimony of Leo M. Zaleski.)

(Whereupon the witness draws on the black-board as requested.)

Q. (By Mr. Williams): Mr. Zaleski, you're [53] indicating a two-section accommodation ladder by that drawing, are you not? A. Yes.

Q. And you are indicating that the upper section is more horizontal than the steps of the ladder call for? A. Yes.

Q. That is the section that you stated would be covered by the board with some cleats on it?

A. Yes.

Q. Have you often seen that done?

A. Yes.

Q. Then, the lower section has the steps at their normal angle? A. Yes.

Q. There would be two pieces of that ladder would have to be suspended in two places by block and tackle?

A. Here and here (indicating).

Q. There and there (indicating)?

A. Yes.

The Court: What does it take, about a 45-degree angle?

The Witness: Approximately that.

The Court: On the lateral side of the ladder to have a horizontal step?

The Witness: Yes.

Q. (By Mr. Williams): Would you also [54] indicate the handrail stanchions on the accommodation ladder that you have referred to?



(Testimony of Leo M. Zaleski.)

(Whereupon the witness draws on the blackboard as requested.)

Q. (By Mr. Williams): The stanchions that you have indicated there, how high are those, Mr. Zaleski?

A. Oh, three, three and a half feet (indicating).

Q. Three and a half feet. Do you know how high they were on this particular accommodation ladder aboard the *Augustin Daly*?

A. No, I am not—I can't recall.

Q. You don't know if they were more or less than that?

A. I don't remember. They may have been more, they may have been less.

Q. Yes.

A. Standard is about three and a half feet.

Q. About three and a half feet is the standard length.

You can resume the chair there.

Mr. Zaleski, I just have one further question at the board there. Would you indicate the position of the liberty launch with relationship to the accommodation ladder? What position does it take alongside the vessel there?

A. You mean as it is now?

Q. Yes, as you have that accommodation ladder drawn in.

(Witness draws on the blackboard). [55]

Q. (By Mr. Williams): Yes. Now, I take it with the Jacob's ladder the liberty launch is directly underneath the Jacob's ladder?

(Testimony of Leo M. Zaleski.)

A. Yes; about in here (indicating).

Q. Yes. Do all the men go up that ladder at the same time or do they go up singly as they do on a Jacob's ladder?

A. Oh, sometimes they go four or five at a time or maybe one or two.

Q. Is the ladder sufficiently strong to support the weight of as many men as want to go up?

A. Yes.

Q. But, they don't go up like they do on the Jacob's ladder? Not one at a time or anything like that?

A. No.

Q. That structure and the steps and all that is rigid that you are walking on, is it not?

A. Yes.

Q. Is it up against the side of the ship?

A. Not directly; swung out a little ways from the side of the ship.

Q. What distance would you say, a foot or more or less?

A. Approximately a foot.

Mr. Williams: Yes. A foot from the side of the vessel. That's all I have on that. Will you take the stand again?

Mr. Zaleski, on cross-examination Mr. [56] Krause asked you a question somewhat as follows: "And you have seen the Jacob's ladder used for getting aboard and off a vessel when it is at anchor in a harbor, have you not?" And I believe your answer was "yes." Will you describe the circumstances under which you have seen a Jacob's ladder employed?

A. Well, when——

(Testimony of Leo M. Zaleski.)

Q. And who used it?

A. Sometimes when the pilot comes aboard and, occasionally, a customs agent and, possibly, a doctor—and, the Japanese longshoremen use them but Americans won't—and the only time I have ever used it is when the ship was under way leaving Singapore. The ship left early and we were——

Q. Would you speak up a little bit, please, Mr. Zaleski?

A. Yes. We were—the ship was leaving Singapore a little early, earlier than it was supposed to, so we were chasing it in a launch and they had the Jacob's ladder over the side and we come up on it.

Q. Is the Jacob's ladder occasionally used for ship's business ashore, captain and various officers, for official business?

A. Sometimes, yes, if only one or two are going to go ashore.

Q. Yes. Have you seen it used for an entire crew for shore liberty other than this one instance at Sasebo?

A. I am not sure. I can't recall.

Q. Mr. Zaleski, after Mr. Farley's injury, the SS Augustin Daly stopped at various other ports in the Orient, did it not?

A. Yes.

Q. Did it, at times, anchor in the harbors of those various ports?

A. Yes.

Q. Was the Jacob's ladder thereafter used by the Augustin Daly for shore liberty?

A. I don't believe so but I am not positive. I don't think it was.

Q. Did you go ashore at most liberty ports?

(Testimony of Leo M. Zaleski.)

A. Yes, I think so.

Q. Most of them you did?

A. Yeah; all except Pusan and they wouldn't let us go there.

Q. Yes. Was Sasebo, Japan, the first port in which the Augustin Daly stopped after leaving the United States on its inter-Pacific voyage?

A. I believe so.

Mr. Williams: I have no further questions.

The Court: Any further questions, Mr. Krause?

#### Recross Examination

Q. (By Mr. Krause): Mr. Zaleski, how long were these pilings on deck that were being discharged off the Augustin Daly? [58]

A. I don't know.

Q. You don't know? A. No.

Q. The length of the piling wouldn't have anything to do with the use of the accommodation ladder, would it? A. I don't believe so, no.

Q. These pilings were rafted when they got down in the water, were they not?

A. I believe so.

Q. So, there had to be a raft floating alongside the ship to put them in? A. No.

Q. Well, how did they take care of these pilings?

A. Tied them together with lashings.

Q. They don't put them into a raft?

A. Well, they build them into a raft.

Q. The boom sticks around them?

A. Yes.

Q. In any event, you say that it doesn't make



(Testimony of Leo M. Zaleski.)

any difference how long they were as far as the use of the accommodation ladder was concerned?

A. No, I don't believe it has any.

Q. Now, what is it that holds this accommodation ladder rigid, as you described it?

A. Well, structure. [59]

Q. What? A. The structure it is built.

Q. What is it that holds it rigid?

A. Well, now, what do you mean "rigid"? In which way?

Q. You used the word "rigid," Mr. Zaleski. Now, you tell us what it means?

A. Well, for one thing the steps ain't moving out from underneath the area and she doesn't have a tendency to sway all around like your Jacob's ladder would.

Q. Your Jacob's ladder is resting against the steel side of the vessel and sways all around, does it?

A. When you ascend it, it does. It has a tendency to.

Q. As you are ascending? A. Yes.

Q. Now, what is holding the lower end of the accommodation ladder when it is in use?

A. Both falls.

Q. What are they made of? A. Rope.

Q. Are they rigid when you step on them?

A. Fairly so.

Q. All right. By "fairly so" you mean that the accommodation ladder sags with you some when you step on it, is that correct? A. No. [60]

(Testimony of Leo M. Zaleski.)

Q. It doesn't?

A. (Witness shakes head.)

Q. In addition to that, since it is hanging from a boat davit with a fall, in addition to sagging when you step on it it sways sideways too, doesn't it?

A. A little.

Q. Yes. And, tell us what you mean by rigid?

A. Well, I mean by the ladder itself it—parts of the ladder doesn't move.

Q. This ladder is attached at the upper end——

A. Yes.

Q. ——firmly to a platform, isn't it?

A. Yes.

Q. And that could be said to be rigid, the upper end? A. Yes.

Q. All right. Now, the lower ends are supported by rope falls? A. (Witness nods head.)

Q. They run through blocks?

A. (Witness nods head.)

Q. When you step on the accommodation ladder you certainly have to take the slack out of the ropes to begin with, don't you?

A. Well, them are pretty heavy ropes. I don't think a hundred and fifty pounds would take much slack out of them. [61]

Q. All right. In addition to that there is nothing to prevent the accommodation ladder from swaying from side to side except when it would hit the side of the ship, isn't that right? A. Yes.

Q. On the outer side there is nothing to hold it what you might call rigid, is that correct?

(Testimony of Leo M. Zaleski.)

A. Well, just the tension of the boat falls.

Q. Tension of the boat falls. Yes. On the diagram that you drew, Mr. Zaleski, does that show your liberty launch as being parallel to the steamer?

A. Yes.

Q. It shows it parallel to the steamer. How long was this launch that you saw there with Mr. Farley lying on it?

A. Oh, twenty-five feet, I would imagine.

Q. What was its beam? A. I don't know.

Q. Well, what would you estimate its beam to be, Mr. Zaleski?

A. Oh, approximately five feet.

Q. Twenty-five-foot vessel in length and a five-foot beam? A. (Witness nods head.)

Q. Now, you haven't attempted to draw this vessel in there with any regard to scale, have you?

A. No, sir.

Q. On that diagram? [62] A. No.

Q. How long is the accommodation ladder altogether?

A. Twenty to twenty-five feet, I imagine.

Q. So, if this vessel was also twenty-five feet long it should be as long as the accommodation ladder in the drawing, shouldn't it? A. Yes.

Q. Have you got the accommodation ladder resting on the ship in your drawing?

A. Yeah. The high part, top end, it is secured to the platform there.

Q. Well, I mean, the accommodation ladder, is that resting on this little launch drawn below?

(Testimony of Leo M. Zaleski.)

A. No.

Q. It is not?      A. No.

Q. So, it is just supported by these falls of the—  
the boat falls?      A. Yes.

Mr. Krause: I think that's all.

Redirect Examination—(Continued)

Q. (By Mr. Williams): Mr. Zaleski, would you know what the approximate weight of the accommodation ladder is?      A. No, I don't. [63]

Q. How is it moved from such position as it may be in over to the position where it is hooked up for use? Is that moved by hand?

A. No; with the falls.

Q. No. I mean, can a couple of men carry this accommodation ladder around?      A. No.

Q. How is it moved?

A. Well, they generally use the winches.

Q. The overhead boom?      A. Yes. Uh huh.

Q. Is the weight of the accommodation ladder itself, does it put a considerable tension on the ropes going up to the davits?

A. No, I wouldn't think so; not too much.

Q. Are those ropes slack when there is no one on the accommodation ladder or is it the weight of the ladder itself that holds it?

A. Well, it's enough to take up the slack but—and there is no strain on them.

Q. You have seen an accommodation ladder rigged for use, have you seen the operation whereby it is set up and put into place?      A. Yes, sir.



(Testimony of Leo M. Zaleski.)

Q. If the accommodation ladder is not in the position that [64] you have indicated, if it's somewhere else on the ship, how long would it take to rig it up?

A. Well, if it was secured or over on the other side of the ship, if they only had the one and she was over on the other side and, say, she was on the starboard side and they wanted it on the port side it might take them, oh, possibly two hours, maybe.

Q. Yes?

A. All depends on what is in the way and how they do it. Sometimes they will just horse it over, take it apart and take the two sections apart and just horse it across the ship and put her back together.

Q. How long does it take to rig a Jacob's ladder down?

A. Oh, ten minutes.

Q. About ten minutes. What is necessary to be done?

A. Well, just throw it over the side and tie the ends on the ship.

Mr. Williams: No further questions.

Recross Examination—(Continued)

Q. (By Mr. Krause): Mr. Zaleski, I made a note to ask you this before. Generally speaking, until the vessel has come to anchor at her place where she is going to discharge cargo or to the dock, everybody that goes onto the vessel or leaves it does so by means of the pilot ladder, doesn't he? [65]

A. Not at all times, no.

(Testimony of Leo M. Zaleski.)

Q. Until the time that the vessel is at anchor or docked, don't they leave—— A. Oh, yeah.

Q. ——go aboard by the pilot ladder?

A. Well, not all the time.

Q. Well, what do they have out for them at other times? A. Accommodation ladder.

Q. An accommodation ladder. That has been rigged up while they were still at sea or when they were coming into the river? A. Yeah.

Q. They put it out while they're still at sea?

A. No, not while they're still at sea.

Q. Yes. Now, how do the health officials board a vessel coming from overseas here in our own rivers, in the Willamette River, in the Columbia River?

A. Jacob's ladder.

Q. By the Jacob's ladder. Those are the doctors of the Public Health Service that come aboard in that way, isn't that correct? A. Yes.

Q. And, the immigration officials, how do they come aboard? A. Jacob's ladder.

Mr. Krause: Same way. I think that's all. [66]

Mr. Williams: No further questions.

The Court: That's all, sir. You may step down.

Mr. Williams: Your Honor, I could start with Mr. Farley. His testimony will take quite some time.

The Court: Do you want to take a short recess?

Mr. Williams: Yes that would be fine, your Honor.

The Court: All right. We will take a ten-minute recess.

(Recess taken.)

JOHN FARLEY

produced as a witness in his own behalf, being first duly sworn by the Judge, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): May I have your name, please?

A. John Farley.

Q. Where do you reside, Mr. Farley?

A. Reedville, Oregon.

Q. Reedville, Oregon?

A. Reedville.

Q. How long have you resided there?

A. Seventeen years.

Q. Are you the libelant in this case, Mr. Farley?

A. Yes, sir.

Q. Prior to your injury what was your occupation? [67]

A. Marine engineer.

Q. What grade?

A. Second assistant, unlimited.

Q. That is the license that you hold from the Coast Guard?

A. Yes, sir.

Q. Second assistant marine engineer, unlimited?

A. That's right.

Q. Unlimited horsepower?

A. Yes, sir.

Q. How long have you gone to sea, Mr. Farley?

A. A little over thirty years.

Q. When did you start?

A. I started around 1922, I guess. It was around in that time. Sailed out of here in 1923. I know that's over thirty years ago.

Q. What did you first sail as?

A. Hold passer.

(Testimony of John Farley.)

Q. Beg your pardon? A. Hold passer.

Q. And from that what other position?

A. Wiper.

Q. Licensed—

A. Wiper, deck engineer, oiler, water tender, and then engineer.

Q. Yes. Did you move up through the various categories [68] of engineer also?

A. I went third and second but I just—I got the ticket right off the reel. Second assistant right off the reel.

Q. How long did you sail as a second assistant engineer? A. Since 1928.

Q. Yes.

Have you sailed as first assistant engineer?

A. I have sailed as first assistant engineer on the Francis W. Barker. That was put in during the war.

Q. Then, you were sailing on a temporary license. A. Temporary license.

Q. As first? A. As first assistant.

Q. Yes. During that period of time did you sail on one particular class of ship or several classes?

A. I sailed on several classes: the passenger boats and freighters, steam schooners.

Q. Since the war have you served on one particular class of ship more than others?

A. Yes, sir.

Q. What type is that? A. Liberty ship.

Q. Liberty ship. The Augustin Daly involved in this case is a liberty ship, is it not?



(Testimony of John Farley.)

A. That was a liberty ship. [69]

Q. Yes. You signed articles aboard the *Augustin Daly*?

A. Signed articles aboard the *Augustin Daly* about the 24th of February.

Q. Were you employed by the ship prior to that date?

A. Yes, sir.

Q. What?

A. I went on about the—I think it was around the 4th or the 2nd of February.

Q. You went on it?

A. I got the job, then went down there and they signed on.

Q. You signed the articles later on in February?

A. Yes, sir.

Q. When you left the United States will you describe your voyage when you first left Portland?

A. We left Portland and we went right—left out of here and went down the river and got in a collision and then came on back again and they fixed the ship up and then we proceeded out again and went to Sasebo.

Q. You left the second time early in March, was it, then?

A. I couldn't just say when it was in March. It was in March, I guess, but I don't know just what date.

Q. Do you recall approximately what date you arrived in Sasebo?

A. The 2nd of April.

Q. 2nd of April. When you arrived there was shore liberty [70] immediately given?

(Testimony of John Farley.)

A. Yes, sir.

Q. How long was the ship at Sasebo?

A. How long what?

Q. How long was the ship at Sasebo?

A. It was there the 6th—from the 2nd to the 6th—the morning of the 6th. It left Sunday morning around, ten, eleven o'clock. They said they was going to sail at that time, that's what I heard that night.

Q. I believe the log will show the Augustin Daly did sail on the 6th of April, 1952. That was the date you were injured, was it not?

A. That is right.

Q. From the date that shore liberty was first given until the date that you went ashore or until the date of your injury, did you go ashore during shore liberty?

A. No, sir. I only went ashore Saturday night.

Q. Just the time when you were injured?

A. I went over there and told the chief I was going to get a haircut and I went ashore. The launch comes back that leaves there at twelve o'clock and I went ashore and done a little shopping and bought some articles.

Q. Just a moment, Mr. Farley. We will get to that in just a moment. I think you are a little bit ahead of me. A. Yes. [71]

Q. But, that was the first time—this is the one and only time you went ashore at Sasebo?

A. Yes, sir.

Q. Was on the day that you were injured?

(Testimony of John Farley.)

A. Yes, sir.

Q. You went ashore on the—— A. 5th.

Q. ——5th at about what hour?

A. After chow around six o'clock at night.

Q. Six at night. And, you returned the next day shortly after midnight, was it? A. Yes, sir.

Q. Now, during the time that the ship was in the harbor in Sasebo was it discharging its deck cargo? A. Yes, sir.

Q. Did it discharge any other cargo out of the hold?

A. I don't know if they discharged any cargo out of the hold or not because I don't pay any attention to that.

Q. Yes. Your station is below deck, is it not?

A. Yes, sir.

Q. Do you know for those days, April 2nd, April 3rd, April 4th, April 5th, and April 6th, what type of appliance was used to provide ingress and egress for crew members going on shore leave?

A. They had the Jacob's ladder. [72]

Q. Is that also referred to as the pilot's ladder? Is that also referred to as the pilot's ladder?

A. The pilot comes up it too.

Q. Well, it is known by that name too, isn't it?

A. Jacob's ladder or pilot's ladder.

Q. Now, will you describe your actions when you left the ship to go on the liberty launch and what you did ashore?

A. I went ashore with Harry Morgan and we both——

(Testimony of John Farley.)

Q. Excuse me. Will you indicate the man's name and what his position was on the ship, please?

A. That was one of the oilers aboard the ship.

Q. Yes.

A. I went ashore with him and I told him I was going to get a haircut. And so he went across the street into a little cafe and he says, "I will be over there and I will meet you when you get your haircut." So, I went and got my haircut and went on over there where he was at. I went in there and I had a beer and we went on uptown and shopped around and I bought some trinkets and stuff to bring back to the ship with me. And when I got back to the little place in the — down from the wharf where they catch the motorboat—there is a little cafe there. Well, I was in that little cafe a year ago or before that and I was in there and I noticed the people was in there so I says, "Can I leave these packages in here?" And I went in there and I went out then [73] around the corner and I bought a couple of more kimonos. When I got finished buying them I come on in and got my stuff and I said, "Well," I says, "what time do we get the launch?" because it was around twelve o'clock then.

So, I got my stuff and I went down towards the launch and then got on the launch and then away we went.

Q. Was Mr. Harry Morgan with you from time to time during that evening?



(Testimony of John Farley.)

A. Yes; he was with me uptown. He was shopping too.

Q. Not continuously?

A. He was with me continuously right uptown right with me. And then he left me and went into a little place where he was at and I didn't want to go in there so I told him, I says, "I am going down to the cafe and I will put my stuff in there because I want to buy some more stuff." So, he went back into this little place where it was at right across the street from the barber shop. And, then I went back and put my stuff and went around the corner and bought me a couple of more kimonos and took them back to the ship. That was it.

Q. Was there any other man that was with you from time to time while you were ashore there?

A. No. Nobody.

Q. Well, do you know Mr. Richard Pattox?

A. Pattox? I met Pattox when he was in that little barroom when I went in there with my stuff. He was in there. [74]

Q. What position does Mr. Pattox hold aboard the ship? A. A wiper.

Q. He is a wiper? A. A wiper.

Q. Both those men were in your general department aboard the Augustin Daly?

A. That's right.

Q. And approximately how many men came ashore in the liberty launch with you, Mr. Farley, to the best of your recollection?

A. Well, I would say maybe about eight or ten

(Testimony of John Farley.)

men went into the liberty launch going over and, coming back, there may have been about twelve or fifteen men coming back in the liberty launch.

Q. Now, approximately what time did the liberty launch leave the dock?

A. Six o'clock. Or, you mean over at Sasebo?

Q. Leave the dock?

A. Oh. It left the dock around twelve o'clock.

Q. Around twelve o'clock. Was there any scheduled time for its departure?

A. Twelve o'clock is when they are supposed to leave out of there.

Q. Had you been told?

A. Yeah; I was told.

Q. By someone aboard the ship that that was the time for [75] departure of the launch?

A. That's right.

Q. That was regular?

A. Regular twelve o'clock. It's a chartered launch and they just—so many times a day to leave over the dock. And, in the morning.

Q. At specific hours? A. That's right.

Q. Who ran the launch? A. What?

Q. Were they ship's personnel or someone else?

A. The Japs.

Q. They were Japanese? A. Japanese.

Q. How much of a crew did this liberty launch have on it, how many persons? Do you know?

A. Oh. On the Augustin Daly?

Q. No; on the liberty launch? Was there more

(Testimony of John Farley.)

than one Japanese person running the liberty launch?

A. That's about all, I think, is just the one.

Q. Just the pilot?

A. Just the man driving it over, yes.

Q. And approximately how long did it take to go from the liberty launch—from the ship to shore, or return?

A. Takes about an hour, three quarters of an hour. About [76] an hour. I would say about an hour or close to it, anyway.

Q. Yes. Are there heavy tides in there or currents?

A. No, there is no currents in there because it is inside the breakwater.

Q. Yes?

A. See, it's set around a big hill and it's inside the hill, see?

Q. Yes. All right. Now, when you got in the liberty launch to return to the Augustin Daly you stated there were about twelve to fourteen men in there. Is that your testimony?

A. That's right.

Q. And do you know the names of any of the other members?

A. No, other than—well, all I know is just Pattox and Morgan. That's all I know. And, then, the big fat cook, I saw him there but I don't know his name or anything. And, I saw them other fellows in that barroom, them colored fellows in there, I saw

(Testimony of John Farley.)

them in there but I didn't—I didn't know their names at that time.

Q. Yes. Now, when you returned on your return voyage from shore to the ship where were you sitting on the liberty launch, if you recall?

A. I was back in the little—a little deck. They got a kind of a little hatch back on that liberty launch and I was settin' back there and I was talking to Morgan——

Q. Yes? [77]

A. ——until we got—got up to the ship. I looked over and saw the ship there and he was pulling—he turned around and come on into the ship and I looked up and saw the ship and I just set there for awhile. And pretty soon he pulled alongside and when he did, why, I just took and got up and walked up and in between a little house—in between a little runway in between the cabin of the house where they steer at. I got—I walked in between that little aisle and then I stood there and wasn't there very long until—and I was just talking to Morgan when this man fell on me.

Q. Now, you said you were sitting aft in this little liberty launch on the way back. First of all, approximately how long was the liberty launch?

A. I'd say, oh, about twenty-five feet.

Q. About how wide? How much—what was the beam of it?

A. Oh, say eight or nine feet. Maybe eight feet, something like that.



(Testimony of John Farley.)

Q. What spaces did they have in this liberty launch for the passengers to sit?

A. Well, they got a little bit of a house in there but I didn't—I didn't look in there or nothing. They got a little place there maybe three or four fellows could go in there and sit if they wanted to if it was raining. The Japs sleep in there. Lot of them Japs sleep in there. I just went and set on the hatch, I didn't pay any attention to them. [78] But, they have little bits of eubbyholes where they sleep. They live on them, a lot of them do.

Q. On your voyage back do you recall any unusual activities and, if so, will you describe them with regard to other members returning with you?

A. I didn't pay any attention to see anything out of the ordinary at all. All I did was went aboard and the rest of them come aboard and that's all. I never heard no activities, any noise or anything.

Q. Did you hear any noise or boisterous activity?

A. No, I never heard nothing.

Q. Yes. Now, as the launch stopped alongside the Jacob's ladder where was the Jacob's ladder with relationship to the launch; that is to say, was it on the forward part of the launch, amidships, or aft, or where?

A. It was—I think it was about the forward end of the launch just right off this little housing, around in there right close in there because I was standing at the housing when this man fell on me. So, I judge it was just about forward of the house there.

(Testimony of John Farley.)

Q. Yes?           A. Where the ladder was.

Q. When the launch stopped you said that you got up and walked forward. Did anyone else do that aboard the launch?

A. Well, it was Morgan and I just—I said, “Well, what [79] do you say we go up and get aboard?” So, we just got up and walked up there just slow.

Q. Did all the men on the launch get up about the same time?

A. Well, there was men forward and there was men all around on the launch but I just—I didn’t pay any attention to any of the other fellows at all.

Q. Yes. Now, did you observe any of the persons going up the Jacob’s ladder?

A. No, sir, I did not.

Q. You didn’t. And this point where you were standing you said was near this wheelhouse?

A. Yes, sir.

Q. Was it forward of the wheelhouse or back of it?

A. It was forward of the wheelhouse.

Q. Forward of it?           A. Yes, sir.

Q. Approximately how far were you from the Jacob’s ladder where you were standing?

A. I would figure about five feet. That’s what I would just figure. I was just about five feet away from the ladder.

Q. Was the liberty launch right up against the Jacob’s ladder or was it out from it a little or what?

A. It could be out—it could be out a little ways

(Testimony of John Farley.)

from the Jacob's ladder because they reach right out and grab a hold of the ladder and pull it out towards them and get [80] on, I know that.

Q. Was the liberty launch fastened, tied to the ship in some manner? A. I don't know.

Q. Yes. Is there any place to tie—are there any cleats or eyes or anything down there for a liberty launch to fasten?

A. No, sir; unless they throw the line up above on deck and wait for—and wait for a certain hour to let the launch get out, or something like that. They could do that and hold it there while they're there.

Q. Now, Mr. Farley, as the liberty launch pulled in alongside the Augustin Daly, on which side of the Augustin Daly was it, port or starboard?

A. Port side.

Q. Was the launch facing the same way as the ship? A. Yes, sir.

Q. Did you look up on top of the ship?

A. I looked up. And when we was coming in I just looked up at the ship when we was coming in. I said, "There she is!"

Q. Did you observe any deck cargo up there?

A. No, sir.

Q. It had been unloaded? A. Yes, sir.

Q. Did you see anyone up there? [81]

A. No, sir. I didn't see anybody up there.

Q. Did you see anyone near the top of the Jacob's ladder?

A. No, sir. I didn't look up there.

(Testimony of John Farley.)

Q. Now, you have stated that you were standing at a point about five feet from the Jacob's ladder. Then what next occurred before you were hit, was there any activity, was there any noise, or what happened?

A. Well, I didn't know nothing, I will tell you. I never heard anything.

Q. Well, what were you doing there?

A. I was just standing talking to Morgan and Pattox was there and I was just talking to Morgan when the man fell on me. That's all I know.

Q. Did you hear anyone yell prior?

A. No, sir. I didn't hear nobody yell because I didn't hear nothing.

Q. Did you see anyone move prior to them?

A. No, sir.

Q. I mean, move rapidly on the deck of the liberty launch?

A. I didn't see anyone. I got hit and that's all I know.

Q. Yes. Were you rendered unconscious by that?

A. Well, I don't — I was — I suppose I was knocked unconscious all right because I don't remember much even when I got in the hospital. I got in the hospital that morning and I — that's all I know. [82]

Q. Were the men that were with you, were they struck, do you know?

A. Well, they told me later they were struck. I don't know a thing about it.



(Testimony of John Farley.)

Q. Well, we don't want—I will ask you to refer to page 6. No, not page 6, but April 6th of the rough log of the Augustin Daly.

(Whereupon the Crier furnished the witness with the document mentioned.)

The Witness: I got to get glasses.

Q. (By Mr. Williams): Sunday, April 6th.

A. Yeah, I got to get glasses now. I got my glasses at home.

Q. Oh, you don't have your glasses with you?

A. No, sir, I don't have my glasses with me.

Now, April 6th. Here is April the 6th.

Q. Do you note an entry on it, it would be the upper right-hand side of that page, relating to your injury?

A. Yes, sir.

Q. What does it say? Read it?

Wait, Mr. Farley. I believe counsel wishes to object.

Mr. Krause: Your Honor, that log is an exhibit. I don't think we have to have the witness read portions of the log into the record because they can be read by counsel [83] or the Court.

The Court: Yes.

Mr. Krause: And it isn't customary to have a witness read out of an exhibit.

The Court: Just call it to our attention, Mr. Williams.

Mr. Williams: I just wish to call to the Court's attention the data contained therein particularly relating to these other two men.

(Testimony of John Farley.)

The Court: Well, in the evidence, if you want to read it into the record, you may do so.

Mr. Williams: I would like to do it.

The Court: You may do so.

Mr. Williams: All right. I would like to do that now, your Honor, and to then remove this witness from the stand. He has just brought us up to the point of his injury. He will have substantially more testimony to relate. I have another witness here that I wish to put on for a very short time just to introduce one document.

The Court: Very well. Do you waive cross-examination?

Mr. Krause: We will reserve it until later.

The Court: Very well.

Mr. Williams: You may step down, Mr. Farley.

The entry reads as follows: "At anchor 0040, Sunday, April 6, 1952, at Sasebo, Japan, John Farley, second assistant engineer, suffered possible back injury and broken [84] ribs while aboard liberty launch waiting to come aboard when Malcolme Potts, assistant cook, fell from the pilot's ladder at main deck level approximately nineteen feet falling on Mr. Farley, Harry L. Morgan, oiler, and Richard Pattox, wiper. Mr. Farley was returned to shore by same boat for transfer to 8041 Station Hospital. Sent message via Naval Signal Station at Kobasaki to hospital requesting ambulance to meet launch." That is all I wish to read at this time, your Honor.

I would like to call Mr. Ralph Niles. Mr. Niles?

The Court: You may do so. [85]

RALPH H. NILES

produced at a witness on behalf of the libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): Your name is Ralph H. Niles? A. Yes.

Q. What is your occupation, Mr. Niles?

A. I am associate actuary at Standard Insurance Company.

Q. Here in Portland, Oregon? A. Yes.

Q. Do you reside in Portland, Oregon?

A. Outside; one of the suburbs.

Mr. Williams: Mr. Bailiff, would you please hand Exhibits numbered 11 and 12 to Mr. Niles?

(Whereupon the Crier did as requested.)

Q. (By Mr. Williams): Have you Exhibit 11 before you, Mr. Niles? A. Yes.

Q. What is that exhibit denominated U. S. Life Table, 1949-1951?

A. Actuarial tables based on United States Life Table.

Q. Is that eleven?

The Clerk: Ten is the one you want?

Mr. Williams: Ten is the one I wish the witness to [86] refer to first. I wanted ten and then eleven. I'm sorry.

Q. What is——

A. Number ten is the——

Q. Yes?

A. ——United States Life Table, 1949 to '51.

(Testimony of Ralph H. Niles.)

Q. Do you know what——

The Court: May I interrupt, please? Number ten is the United States Life Table, 1949 to '51.

Q. (By Mr. Williams): Who is the publisher of that document?

A. It is published by the United States Department of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics.

Q. What is the report based on as it states on it?

A. Well, the face on it just says "The vital statistics special reports, Life Table for 1949 to '51." But——

Q. Mr. Niles, do you use this document in your work commonly?

A. Not in connection with our life insurance work. We have it in our office for reference.

Q. I see. Now, will you please look at Exhibit Number 11? What is that?

A. This is the actuarial tables, based on United States Life Tables 1949 to '51.

Q. Who is the publisher of that?

A. That is published by the United States Department of Health, Education, and Welfare, Public Health Service, [87] National Office of Vital Statistics.

Q. Now, Mr. Niles, will you refer to the table therein which has actuarial statistics for American white males and do you find the age fifty-eight for American white males on one of the pages?

A. Yes.



(Testimony of Ralph H. Niles.)

Q. Now, going across the column to the left what is the last figure that appears opposite that age?

A. You mean to the right, don't you?

Q. Yes; to the right. Excuse me. I'm sorry.

A. United States white males in the last column shows the values of 8 sub X. You want the amount?

Q. Well, yes. What does it give for——

A. For age fifty-eight 13.3735.

Q. For age fifty-eight?                      A. Yes.

Q. 3735. Now——

Mr. Krause: What is that, money that you are talking about?

Mr. Williams: No, it isn't. He will explain what it says.

Mr. Krause: Well, this is an exhibit, your Honor. It is published by the Government. Now, I can read it, the Court can read it, counsel can read it into the record but I can't check this witness to see whether he is reading the [88] figures.

The Court: I understand that.

Mr. Williams: Your Honor, this is merely——

The Witness: I'm sorry. I was on the wrong page.

Mr. Williams: Oh, are you?

Mr. Krause: Now——

Mr. Williams: The witness is going to explain the use of it.

The Court: Just a moment. I'm awfully sorry, I'm not accustomed enough to the courtroom yet. I actually did not hear the witness and I'm going

(Testimony of Ralph H. Niles.)

to ask the Court Reporter to go back and read his last several questions for me.

(Whereupon the previous question beginning "Q. Now, Mr. Niles, will you refer to the table therein which has actuarial statistics . . ." and the following testimony up to the point of Mr. Krause's objection was read by the Court Reporter.)

The Court: Now, there is no particular reason for the witness reading into the record the document which has been received. And, I would suggest that since the documents have been identified that you now move their admission and then I can cross the bridge.

Mr. Williams: Oh, I regret that I haven't already done [89] that, Your Honor. I do move their admission into evidence.

The Court: Any objection?

Mr. Krause: We have no objection, Your Honor.

The Court: They will be received.

(Whereupon the documents identified by the witness as United States Life Tables previously marked for identification as Libellant's Exhibits 10 and 11 were thereupon received in evidence.)

The Court: Now, they may speak for themselves. If there is any explanation due you may ask the witness about it.

Mr. Williams: I feel there is, Your Honor. That's all I have been trying to get to.

The Court: All right.

Q. (By Mr. Williams): Now, again, Mr. Niles,

(Testimony of Ralph H. Niles.)

opposite the age fifty-eight for American white males what is the last—there is a figure in the last column to the right, is there not?

A. There is a series of tables for United States white males at various interest rates.

Q. Yes?

A. The most appropriate interest rate, in my opinion, would be 3 per cent and the last figure in it to the right opposite age fifty-eight and the 3-per-cent tables is 12.1358. [90]

Q. Now, will you tell the Court—well, first of all, is there a heading for that column and what is the heading?

A. The heading is A sub X.

Q. A sub X?

A. Yes.

Q. What does that mean? What does that column denote?

A. A indicates an annuity. It is a common notation in actuarial science to indicate an annuity. The X subscript indicates the age at which the annuity is to start. This represents a whole life annuity starting at the age shown in the left-hand column.

Q. Starting at age fifty-eight?

A. In this case, age fifty-eight.

Q. Now, what application is to be made of that figure? I mean, what does that mean?

A. That life annuity value represents a present value to a man aged fifty-eight of an income of one dollar per year payable as long as he shall live.

Q. That is not on life expectancy but for his lifetime?

A. For his lifetime no matter how long he lives.

(Testimony of Ralph H. Niles.)

Q. Then, if we were to assume that a man had an income, let's say, of a thousand dollars a year and he was aged fifty-eight; that is to say, to provide him with an income of a thousand dollars a year for his lifetime you would multiply one thousand times that figure? [91]

A. That is correct.

Q. The answer in that case would be \$12,135.80. I have no further questions.

The Court: Cross-examine?

#### Cross Examination

Q. (By Mr. Krause): Mr. Niles, what are these tables based upon, first of all, the United States Life Table?

A. They are based upon the 1950 census and the death statistics during the years 1949 to '51.

Q. That is the expectancy of life, then, is taken from the experience during two years, is that correct?

A. Well, during a period of three years: 1949 to and including '51.

Q. Oh. It includes 1949, 1950, and 1951?

A. That is right.

Q. That is the deaths occurring in that time?

A. Yes.

Q. They are used as the basis for determining what a person's expectancy of life is? A. Yes.

Q. That takes in all deaths at any rate and all people living at that time in the United States?

A. Yes.



(Testimony of Ralph H. Niles.)

Q. It has no relationship to occupation, does it?

A. No. It includes all occupations.

Q. All occupations from the least hazardous and exacting to the most hazardous and exhausting?

A. Yes.

Q. Does the line of work that a man has followed during his lifetime have any bearing upon his expectancy of life?

A. Yes.

Mr. Williams: Your Honor, I feel that isn't the question for this expert. That is not a proper cross-examination.

You are asking him a medical question, aren't you, not an actuarial one?

The Court: I misunderstood the question, then. May I have it again so I will be sure?

Mr. Krause: I thought it was an actuarial question.

(Last question and answer read by the Court Reporter.)

The Court: I think that is a matter of common knowledge.

Mr. Williams: I do too, your Honor, but nothing particularly for an expert.

Mr. Krause: Maybe I don't understand what is going on here, Your Honor. There were tables introduced here.

The Court: I wonder, Mr. Krause, if you don't have in mind what I thought you had in mind as to whether or not these tables take into consideration the occupation of the individual? [93]

Mr. Krause: Well, he said they didn't.

(Testimony of Ralph H. Niles.)

The Court: Well, that was what I understood and I thought that was just an extension of that remark.

Mr. Krause: Yes, that was.

The Court: I think that is competent inquiry so far as this testimony is concerned but I am inclined to agree with counsel that it is a well-known fact that occupations, whether hazardous or not, may be taken into consideration by any person in determining what the ultimate expectations might be. I think it is more an argument.

Mr. Krause: But, an actuary that sets up the— now, he read some figures or they were talking about figures upon which he is computing what a man would have to have to give him an annuity of so much for the balance of his years if he was fifty-eight at the time it was to start. Now, then, I wanted to inquire and to see just what factors go into this thing. I don't know anything about these U. S. tables and I assume that since Mr. Niles was an actuary with an insurance company that he would be the man. Otherwise, I don't understand why he was brought here because he doesn't know anything more about these tables than what we can read in them. I wanted to inquire from him just what the nature of the table is so we know how to apply them.

The Court: I think you certainly have that right, Mr. Krause. But, I am inclined to agree with [94] counsel that your last question doesn't go to that inquiry. I think your first one did.

(Testimony of Ralph H. Niles.)

Q. (By Mr. Krause): Now, the tables are separated for men and women, are they? A. Yes.

Q. That is male and female? A. Yes.

Q. As far as these U.S. Life Tables are concerned they have nothing to do with the insured's mortality? A. No.

Q. Beg your pardon? A. No.

Q. If those tables were based upon a longer period of time than three years, '49 to '51, it would be likely that different results would be obtained, would it not? A. Possibly.

Q. Well——

A. There are many factors that enter into the thing.

Q. If you took the years earlier than '49 the probabilities are that the expectancy would be lower? A. Yes.

Q. Is that correct? A. That is correct.

Q. If you took the years following 1952 the expectancy would probably be longer, isn't that correct? [95]

A. Yes, we would expect that. The mortality rate has been reducing and——

Q. Yes. The mortality rate is being reduced, yes. Now, when you say that the mortality rate is being reduced most of the increase in the average span of life is due to the prevention of disease and deaths of children?

Mr. Williams: Your Honor, I don't think this is an actuarial question and I will object. It is more in the realm of medicine.

(Testimony of Ralph H. Niles.)

The Court: I disagree with you. Those are all statistics which the actuary had to work with. He may get his information from a medical source but that is what he has to work with, how many people were born and how many people died.

Mr. Williams: I didn't understand that to be the question.

Q. (By Mr. Krause): Do you know the question, Mr. Niles?

A. Yes. In my opinion that was true up to, possibly, fifteen or twenty years ago, but at the present time there are improvements being made at the older ages which tend to increase the life expectancy at the older ages as well as at the younger ages.

Q. Well, both factors must now be taken into account, must they not? A. Yes.

Q. As children's diseases are eliminated that is a factor in determining expectancy? [96]

A. (Witness nods head.)

Q. As the diseases of old age are brought under control there may be some increase in expectancy there, is that generally correct?

A. Yes, that is correct. And, the statistics show that there has been improvement at the older ages.

Q. Yes. Now, what I would like to know under these United States Tables, when they have figured the expectancy of a man of fifty-eight in that period from '49 to '51 did they take only people at that age in order to determine that or is it based upon people at all ages?

A. It is based on the people at all ages.



(Testimony of Ralph H. Niles.)

Q. All ages?

A. All ages fifty-eight and over.

Q. There is no attempt being made to get the exact expectancy of life from people fifty-eight years of age?

A. There is no way of doing that based on a three-year period because they don't know how many people are aged fifty-eight. Now, how long they will live, how many of them will die at each age in the future——

Q. No. But of course, if you took all people aged fifty-eight twenty years ago you would come close to it, would you not?

A. If you took people fifty-eight twenty years ago they would be subject to the mortality that was experienced [97] during the previous twenty years. And, the mortality rate at the present time is lower than it was twenty years ago.

Q. Yes. But, we know how much it has been reduced to, don't we?

A. Yes.

Q. We know how much the average length of life has been increased in those last twenty years, don't we?

A. Yes.

Q. So that if you added that figure to it and took the age fifty-eight then you would have made allowance for the improvement generally?

A. If you were to do that you would arrive at a larger expectancy than would be shown by this table. This table is based on the mortality rates experienced during the three-year period, 1949 to '51. Mortality rates at each age, that is the rate of

(Testimony of Ralph H. Niles.)

mortality, number of people who died out of a thousand are determined at each age and based on those rates of mortality a life table is prepared. These annuity values which have been presented in evidence are based on the life table. That is based upon those mortality rates.

Q. Taking them age by age?

A. That is correct.

Q. Now, do those annuity tables—have they taken into account the cost of—well, we will say, doing business, investing money. [98]

A. No.

Q. In order to develop it?

A. They have taken into account only mortality rates and interest.

Q. They have taken into account mortality rate and a 3 per cent interest rate?

A. 3 per cent interest, yes.

Q. They are, then, not annuity tables that any insurance company has used?

A. No, they are not.

Q. Are there any figures that are used by actuaries based upon—well, any figures used that actuaries have that show the differences in expectancy of men in different occupations?

A. So far as I know there are no mortality tables prepared for different occupations. The insurance companies charge higher premiums for different occupations but they are not based upon mortality tables compiled for the separate occupations. So that the life expectancy would not be available for different occupations.

(Testimony of Ralph H. Niles.)

Q. But, generally, the insurance companies charge higher rates with respect to occupations that are regarded as more hazardous?

A. That is correct.

Q. Also, that people in that occupation have a lower expectancy? [99]

A. Yes, they are assumed to have a higher rate of mortality which automatically gives them a lower life expectancy.

Q. Now, is the work of an engineer going to sea a more hazardous occupation than occupations ashore?

A. I am not qualified to answer that.

Q. And you don't know——

A. I don't know.

Q. ——whether rates are adjusted?

A. There are tables available. I don't work with them. There are tables available at the office and I would have to refer to those tables before I would want to answer it.

Mr. Krause: Yes. I think that's all. Thank you, Mr. Niles.

Mr. Williams: Just one more question.

*Redirect Examination*

Q. (By Mr. Williams): Mr. Niles, these tables, besides being broken down as to males and females, are broken down between whites and non-whites, are they not? A. Yes.

Mr. Williams: That's all.

The Court: We will adjourn until ten o'clock tomorrow morning.

(Whereupon Court adjourned to be reconvened at 10:00 o'clock a.m. July 28, 1955.) [100]

Morning Session

(Whereupon the Court convened at 10:00 o'clock a.m., pursuant to adjournment.)

Mr. Williams: Call Captain M. D. McRae.

CAPTAIN M. D. McRAE

produced as a witness on behalf of the libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): May I have your name, please, for the record?

A. Captain M. D. McRae. M-c-R-a-e (spelling).

Q. Where do you reside, Captain?

A. At 2515 Northeast 9th.

Q. In Portland, Oregon?

A. Portland, Oregon. Right.

Q. How long have you resided in Portland?

A. In Portland?

Q. Yes? A. Ten years.

Q. What is your present employment, Captain?

A. I am Representative of the Masters, Mates and Pilots Local number 90.

Q. Is that group the masters, mates, and pilots, of this area—how big is it? [101]

A. Of the Portland area?

Q. Of Portland.

A. Including other ports of the State of Oregon.

Q. And how long have you held that position?



(Testimony of Captain M. D. McRae.)

A. I have been here for ten years.

Q. In that employment?

A. (Witness nods head.)

Q. Prior to that what was your occupation or following?

A. Well, I was going to sea prior to that.

Q. As what?

A. In any wheres from 1927 I had my master's license and I been in any capacity regarding officer's capacity aboard a ship since that time.

Q. In 1927 you had your ships' master license?

A. No, not the master's license.

Q. Oh?           A. I had my first license.

Q. Your first mate's license?

A. That's right.

Q. You have been a Master for how long?

A. Yes. I been a Master for about ten years.

Q. About ten years. What class of vessels did you sail, all classes?

A. Well, mostly liberty ships after the war started. Before that there was some merchant marine. Those trans-marine boats. [102] They were built on the East Coast during World War I.

Q. Yes.

A. Then, of course, on all kinds of coastwise boats including the H. F. Alexander—all of those boats—for the Pacific Steamship Company—the old Pacific Steamship Company.

Q. Have your voyages taken you various points and places in the world?

(Testimony of Captain M. D. McRae.)

A. Yeah; most any place in the world, you might say.

Q. Have you made trans-Pacific voyages?

A. All around the world.

Q. Yes. Now, Captain, when a ship is in a harbor at anchor whose duty is it to determine what type—oh, first of all I will ask you who determines whether shore liberty shall be given?

A. The Master of the vessel.

Q. Yes. Who determines what appliances shall be used to enable the crew on shore liberty to leave the deck of the vessel and get to a liberty launch to go ashore and return?

A. That is the duty of the Master of the vessel too in the exception that he might be ashore then it is the first mate's duty.

Q. The first mate's duty in his absence?

A. Yeah.

Q. What duties do engineer officers of the [103] ship have with regard to that particular function?

A. Engineers have nothing to do with that particular function.

Q. They don't select the method or——

A. Definitely not.

Q. Yes. What is the duty of Engineers Department in general? The engineer office, what are they?

A. Their duty is in the engine room.

Q. To keep the ship in good——

A. To keep the ship and the engines going and to keep the engine room in condition, whether she is seaworthy. And also their duty is to take their

(Testimony of Captain M. D. McRae.)

orders from the bridge like any other of the crew. Their orders comes from the bridge.

Q. Does the second assistant engineer take his orders directly from you or through his chief or what?

A. He takes his orders from the chief engineer with the exception if he happens to be on watch and in charge of the engine room alone which at times the engineer is asleep he gets his orders direct from the bridge.

Q. Now, are engine-room officers, and that is to say, a chief engineer, first assistant engineer, or second assistant engineer, are they general officers of the ship?

A. Well, the term officer is something that has been handed down. In other words, why, on a merchant marine vessel the master of the ship, the first mate, the second mate, third mate, and fourth mate, their license, when they get it, are [104] marked that way; not second officer, first officer, third officer, or so on. Their license is marked First Mate, Second Mate, Third Mate; same with the engineers. On their license their licenses are not marked officer at all, their license is marked First Assistant Engineer, Second Assistant Engineer, Third Assistant Engineer. And, they have, of course—that's the way they are licensed. They have junior assistant, and so forth. But, in order to be a junior assistant, and so forth, you still got to carry a third mate's license. So, these are the licenses issued by

(Testimony of Captain M. D. McRae.)

the United States Coast Guard and that's the way they're written up.

On the articles that the ship is signed the articles are signed exactly the same way, not officer but First Mate, Second Mate, Third Mate, Fourth Mate. Same with the engineers, First Assistant, Second Assistant Engineer, Third Assistant Engineer, Junior Engineer, so on. They're not marked officer. The term officer is something that has carried on down from the old days.

Of course, naturally, we use it a lot. If somebody happens to come aboard and they ask for the second officer, why, that means the officer of the deck.

Q. Yes?

A. But, actually, when it comes down to it it's not officially.

Q. Yes. Who is the representative on the ship of the [105] ship owners?

A. The Master is sole representative of the ship owner aboard the vessel.

Q. Now, Captain, have you been in port numerous times over your career where the ship was anchored at anchor in a harbor? A. Yes, I have.

Q. Where shore liberty was given?

A. Yes, I have.

Q. You have ordered shore liberty for your men several times under those circumstances?

A. Yes, I have.

Q. What is a safe means to provide ingress and egress from the vessel to the liberty launch and return to the ship?



(Testimony of Captain M. D. McRae.)

A. Will you say that again? I didn't quite get you.

Q. What is a safe means by which to gain egress and ingress from the deck of the vessel down to a liberty launch and, of course, in returning from a liberty launch back up to the vessel?

A. It is the accommodation ladder.

Q. Is a so-called pilot's or Jacob's ladder a safe means to provide ingress and egress for a crew on shore liberty while a vessel is anchored at the harbor?

A. No. It is not considered a safe means for regular liberty crews going ashore. The accommodation ladder is there for that purpose and should be used at all times when [106] crew is going on shore liberty and coming back from shore liberty, not the Jacob's ladder.

Q. What is a Jacob's ladder customarily used for?

A. Well, it is customarily used for mostly in emergency, pilots coming aboard, and also where there is no crew liberty sometimes they use it if the ship is anchored for only a short time for the Master and the—whoever he might decide to take ashore with him to help him out in clearing the ship and entering the ship, but not as a rule. The Jacob's ladder is not used for shore liberty for the crew.

Q. Is a Jacob's ladder sometimes used for specific duties of certain members of the ship ashore?

(Testimony of Captain M. D. McRae.)

A. No—you mean taking certain members of the ship to——

Q. For example, say that only an engineer is required to go to shore to measure some bunkers, or something like that?

A. Well, he——

Q. Or taking on fuel?

A. If he—if the ship—if there was no shore liberty for the crew?

Q. Yes?

A. He would have to go ashore then in conjunction with somebody that the Master might order to go with him or get his orders from the Master to be able to do that.

Q. Yes?

A. He is not supposed to take it under himself to go [107] ashore when there is no shore liberty for the crew without getting permission from the Master or the chief engineer. He could get permission from the chief engineer but the chief engineer would have to get permission from the Master too. He is still under the Master.

Q. Captain, under those circumstances if just one or two men that you refer to were going ashore what appliance would be used then for——

A. Well, it all depends. If there was no shore liberty, if the Master didn't go ashore with him himself, he would send another mate ashore with him.

Q. Yes. What would they provide to get from the deck of the vessel down there?

A. Well, the proper thing would be to use the

(Testimony of Captain M. D. McRae.)

accommodation ladder but sometimes they did use the Jacob's ladder for just a couple of men or something like that——

Q. Yes.

A. ——where there was men with them to see that they did the right thing and came aboard the right way. And, as I say, we never let them go alone.

Q. Yes. Now, Captain, why do you say that an accommodation ladder is a safe method of getting—providing ingress and egress for shore liberty for a crew and that a Jacob's ladder is not safe? What are your reasons for that?

A. Well, naturally, the accommodation ladder is safer [108] because it's rigged.

Mr. Krause: Well, your Honor, I want to object to this because it is not a question of whether the accommodation ladder is safer because the ship owner is not obligated to furnish the safest method. The question is whether a pilot's ladder or accommodation ladder is not a safe method of getting aboard or leaving a vessel. And, the witness says that the accommodation ladder is safer and I move to strike that.

The Court: Yes, I think that is correct. That is purely a conclusion in the matter.

Mr. Williams: Your Honor, the deposition of certain officers of the ship have not yet been introduced in evidence, contend, however, that the Jacob's ladder is safer. I feel that at least at that time——

(Testimony of Captain M. D. McRae.)

The Court: You mean that is testimony on behalf of the defendant?

Mr. Williams: Yes.

The Court: All right. If that be true you are attempting to answer that.

Mr. Krause: Well, your Honor, may I say this that there was no judge to rule on the admissibility.

The Court: I understand that, Mr. Krause.

Mr. Krause: And, therefore, that evidence, if counsel objects to it, will not be before the Court later.

The Court: That's what I anticipated. That's the [109] reason I suggested that in any event this testimony would only be admissible in rebuttal.

Mr. Krause: I'm sorry.

Mr. Williams: I realize that.

Q. Captain McRae, you understand the Court's ruling on the point of objection raised by Mr. Krause? A. I do.

Q. That is, you are not required or asked to say which is really safer. But, my question was why do you say that an accommodation ladder is safe to provide shore liberty for a crew and a Jacob's ladder is not safe? That is my question. You don't need to state that one is safer than the other, just state your reasons for that.

A. The accommodation ladder, naturally, is the safe thing because that's—for years the accommodation ladder has been the connection between the ship and shore and the safest way for the crew to go ashore and come on board again, not the Jacob's



(Testimony of Captain M. D. McRae.)

ladder. If the Jacob's ladder was a safe—considered to be the safest way for men to come back on board the ship or to go ashore from the ship we wouldn't have to have an accommodation ladder there at all which is a very costly thing.

Q. You mean the accommodation ladder is?

A. Yes. It costs a lot of money to make an accommodation ladder and it don't cost very much to get a Jacob's ladder. [110]

Q. Does it cost more in terms of time in rigging an accommodation ladder over a Jacob's ladder?

A. Well, yes. Yes, it takes sometimes at least an hour and maybe a little bit more. But, most of the time before the ship arrives at port and we know we are coming in and going to anchor or are going to the dock we can do most of the rigging with the crew and have the accommodation ladder ready to lower away as soon as you get alongside the dock or get it anchored. It's on a bridle with a tackle hitched up to a davit on the boat deck and you get it all fixed up all ready. When you get to anchor or get to the dock you can lower it down and that's all.

Mr. Krause: Now, your Honor, I move to strike all of the Captain's testimony with respect to the comparison of the two ladders because all that I heard was that the accommodation ladder was safer than the pilot's ladder and nothing regarding the matters that counsel asked for in his question as to why the accommodation ladder was safe whereas the pilot ladder was not safe.

(Testimony of Captain M. D. McRae.)

The Court: Yes. I think the witness' statement in connection with the answer to counsel's question is merely a matter of argument and a description of rigging up the accommodation ladder. And, that's not the point of the inquiry.

Mr. Williams: Your Honor, the question to the witness— [111] the last question was does it take more time to rig one than the other and I think that is a perfectly proper thing to ask.

The Court: How is that material? It does not matter how much time it takes. The ship owner is responsible to get a safe place.

Mr. Williams: I think it would go to show that it is a practical device to be used which can always be shown in these employer liability cases if you show the existence of a good practicable device and it was not used it is permissible to show that in order that such a device existed and was not used.

The Court: Well, perhaps I misunderstand the Captain's testimony. His whole testimony was disparaging to the use of the accommodation ladder because it took longer and was more expensive, it cost more. If that is your intent to show that that is practicable, why, it seems to me that that essential is not the meaning of the Captain's testimony.

Mr. Williams: I wish it could be reread to the Court. I don't think that it carries——

The Court: I heard the testimony, Mr. Williams. Now, I think that what you are attempting to do is to anticipate the defense of the defendant in this cause. Now, the burden of your proof is that the

(Testimony of Captain M. D. McRae.)

Jacob's ladder which is admittedly used was not safe. That's your proposition in the case. [112] If then some other matter comes in on the defense you will be able to meet that in rebuttal. I think that is what you are attempting to do by asking these questions.

Q. (By Mr. Williams): Captain McRae, what reason do you have for saying that a Jacob's ladder is not a safe means of providing ingress and egress for crew members going to and returning from shore liberty without saying anything about this other device, the accommodation ladder and without discussing that for the moment? Can you give reasons why you consider the Jacob's ladder is not safe?

A. Well, under conditions which arise more so in the crew coming back aboard the ship, a Jacob's ladder is something that you have to have both hands and both feet to come up. In other words, why, if you—if you are not in a—coming up a Jacob's ladder holding on by one hand, or anything like that, you have got to use your both feet and both hands to come up a Jacob's ladder. And, you got to be—if you—if it is a long way down, nineteen, twenty feet, twenty-five feet, you just don't make that without having a little energy to do it. You got to be—watch every move you make coming up on a Jacob's ladder, especially. Going down it's not so bad. But, coming up a Jacob's ladder you got to hold on with both hands and with both feet. And, if it is a long way up there by the time you get

(Testimony of Captain M. D. McRae.)

to the top of the ladder if you're especially a heavy man or a little bit on the weak side, or [112-A] something, you get pretty well puffed up—puffed out by the time you get to the top of it. And, there should be a man there at the top of the Jacob's ladder to help you over the last few humps, over the humpy last minute.

Mr. Krause: I move to strike the latter testimony, your Honor, on the grounds it is not one of the issues in the case. There is no contention made that there should have been a man there to help anybody over the rail as far as anything I have discovered in the case so far.

Mr. Williams: I will have to disagree with that, your Honor.

The Court: Let counsel make his record.

Mr. Krause: Furthermore, it was not called for by the question itself and was not responsive.

The Court: It was a voluntary statement.

Mr. Williams: I will agree it was not responsive to the question but there is such an issue. An issue is made in the pre-trial order, your Honor, with regard to the matter that Mr. Krause objected to. I will read it in just a moment. It is Libelant's Contention Number 2f. "Respondent was negligent for having failed to supervise the boarding of said vessel by crew members ascending said pilot or Jacob's ladder while returning from shore liberty."

The Court: Well, we will cross that bridge when we get to it. The statement of the witness to the effect that [113] there should be a man at the rail



(Testimony of Captain M. D. McRae.)

to help him over the rail is stricken from the record because it is not responsive to the question.

Now, you can phrase your proper question when we get to that issue.

Mr. Williams: I will, your Honor.

Q. Captain McRae, is there any rule or practice with regard to a man being on deck watch, a sailor or an officer, when crew members are returning from shore liberty?

A. When a ship is at anchor there is a deck officer in charge at all times even at the dock, not alone at anchor. And, it certainly is the rule and the practice that when the boat leaves for shore—the liberty boat leaves for shore that the deck officer either be there himself or have a man assigned from the deck crew to be there at the time the liberty boat goes ashore. And, the same thing should happen when the liberty boat returns to take the crew back aboard the vessel, absolutely is their duty to be there and——

Q. Captain McRae, is it your testimony that when a man reaches the top of the Jacob's ladder and is just about ready to go over the rail, if he has climbed a long distance his energy is fairly well spent at that point, is that what you said?

A. That's right. I don't care whether—how—how good a man he may be he is going to get puffed by the time he gets to the top of that ladder if he has got to come up a [114] long way.

Q. If the ladder goes over the rail what does

(Testimony of Captain M. D. McRae.)

the man have to hold onto as he gets up to the top there?

A. He has practically got nothing to hold onto, only to reach over the gunwale and grab from the inside on the—it turns that way. There is an angle iron that turns, he can catch it inside on the angle iron to pull himself over the railing. Actually, the ships have a little ladder built about that—just about the height of the bulwark (demonstrating) with two or three steps on it and they set that on them for to step on to get down to the main deck.

Q. Get down?

A. Yes; get down to the main deck. But, he is not—sometimes they lash it and sometimes they don't. But, it should be lashed.

Q. Is it your opinion that a deck watch should be provided to assist men coming over the rail on the Jacob's ladder?      A. Certainly.

Mr. Krause: Just a moment, Captain.

The Witness: Certainly.

Mr. Krause: The pleadings say "supervision," your Honor. Now, if there is going to be an issue I would like to be advised if it is an additional issue.

The Court: Can you answer counsel's query?

Mr. Krause: It seems to me this case has been under way [115] for a long time. We took six or eight depositions in this matter and the thing hasn't been mentioned up to this moment. And, we are not prepared to meet that particular issue unless it is now within the issues as they are framed.

(Testimony of Captain M. D. McRae.)

The Court: Do you claim that having a person on top of the ladder to actually physically assist and help any member of the crew climbing the ladder is covered by your contention of failing to supervise the boarding?

Mr. Williams: I feel that it does, your Honor. I have no other contention that covers the point more specifically than that.

The Court: Well, I think it is stretching the word supervise.

Mr. Williams: Your Honor, I can't hear.

The Court: I think it is stretching the meaning of the word supervise to hold that that includes actual physical assistance, particularly under the issue of—if it becomes a finding of helping a drunk man aboard. I just use that by way of analogy without finding it. The objection will be sustained.

Q. (By Mr. Williams): Captain McRae, when men climb the Jacob's ladder, do they normally climb it one at a time?

A. That is the correct way of doing it.

Q. Then, if a man is on the ladder he is there all by himself? [116]

A. That's right.

Q. There isn't another man behind helping him, or anything like that?

A. No. It would be very hard for a man behind to help anybody to climb up the Jacob's ladder.

Q. If a man were to fall from a Jacob's ladder, normally where would he end up?

A. Well, that depends. All the way—on account of the way he would fall. If he let go with his

(Testimony of Captain M. D. McRae.)

hands and went backwards, naturally, by the time he dropped down, hit the bottom wherever he might hit, he would be probably out five or six feet away from the side of the ship. But, this certain case, a man can fall another way. His feet can slip at the same time and let got with his hands and, naturally, he comes straight down.

Q. Yes. But, in any event, would he land in the water or where would he land?

A. Well, if the boat was close up against the side of the ship, naturally, he would land some place on the liberty launch.

Q. On the liberty launch?

A. But, if the liberty launch was away from the side of the ship a little bit he would probably go down in between, if he came straight down, and land in the water. That's something what you—it's under the conditions, which way would it happen.

Q. Yes. Captain, are you familiar with the duties of the second assistant engineer aboard the ship?

A. Yes, I am familiar with the duties.

Q. Do you know what his duties are when he is on shore liberty and is not aboard the ship?

A. Well, when he is on shore liberty and he is not aboard the ship he is a free man, he is on his own.

Q. It is your testimony he has no duties or responsibilities to the ship, then?

A. Not unless he is on watch and gone ashore for some duty for the Chief Engineer or the Master.



(Testimony of Captain M. D. McRae.)

But, if he is off duty and he is ashore on liberty he is his own boss.

Q. Suppose he is in a liberty launch returning to a vessel, does he have duties and responsibilities with regard to the other occupants of that liberty launch, assuming that they are all crew members?

A. That liberty launch is a launch chartered by the ship.

Q. I am assuming that it is not owned by the ship.

A. He is just a passenger like the rest of the crew.

Q. When the liberty launch gets back alongside the vessel and men start to climb up it, does a second assistant engineer—have his duties commenced yet with regard to the ship?

A. No. He has no duty at all until he gets aboard the vessel and then he has no duties as long as he is off watch or unless he is directed by the Chief Engineer or the Master. [118]

Q. Yes. Does he have duties, generally, with regard to other members of the vessel that are not in the engine room?

A. No. That is the Master's duty.

Q. The deck watch, as you have stated, Captain, that should be provided when men return from shore liberty, what is the purpose of the deck watch?

A. Well, the mate that is on watch, he observes everybody to see that everything is safe and everything is taken care of. In actuality he is there for the safety of the ship. That's why they keep a deck

(Testimony of Captain M. D. McRae.)

officer on watch at all times especially when the ship is at anchor. It's always the case of the ship draggin' or anchor draggin' and the ship moving about, or something, and especially if they're loadin' cargo there isn't any doubt that there has got to be an officer out on the deck on duty when they're discharging cargo. Maybe two of them if they're working four or five holds or working more than that. And, there is no ship of any kind under the American flag that goes to anchor that don't keep a deck watch. And it's his duty to see that everything is in shipshape order and see that nothing happens while he is on watch.

The Court: May I interrupt, please, Captain?

The Witness: Certainly.

Mr. Williams: Yes.

The Court: By way of analogy, would it be safe to say [119] that your deck officer is security officer of the ship?

The Witness: Well, in one way you might call him a security officer and in another way he is the regular ship's officer at the same time. You could call him a security officer but we don't generally call him security officer.

The Court: His duty is to protect the ship?

The Witness: He is there and that's what we have him there for.

The Court: And, if, for example, there was violence on the ship would he have authority to cause an arrest if he had to?

The Witness: Sure. He certainly would.

(Testimony of Captain M. D. McRae.)

The Court: If violence was being committed, not damage to the ship, but violence between crew members such as a fight between crew members, would the second or third assistant engineer have any authority by reason of his office?

The Witness: No, not unless ordered by the deck officer.

The Court: All right. Thank you.

Q. (By Mr. Williams): Is it also a duty of the deck officer to prevent the bringing of unauthorized persons or cargo aboard the ship?

A. It certainly is. That's what he is there for.

Q. Captain, is it, in your experience, a usual and customary thing that men returning from liberty have had something to drink? [120]

A. Well, I will answer that: you know seamen. From years and years that's—they been to sea for a month and they go ashore and generally always the rule if they're not half lit up they're all lit up when they come aboard the vessel. That's the principal time he should be careful—a man coming aboard the ship during the time the crew comes back from shore liberty. You know the history of sailors as well as I do. I don't have to tell you, just the history of sailors.

Q. Well, Captain, as you say, is it a usual and customary thing men returning from shore liberty in foreign ports often bring back packages with them?

A. That is correct, yes.

Q. Souvenirs and various things of that nature?

A. Yes. They have lots of things coming back.

(Testimony of Captain M. D. McRae.)

Souvenirs and what have you. Some of them as big as——

The Court: Is there any testimony here in issue that this man was carrying packages other than the two bottles of whisky?

Mr. Williams: That is a little unclear, your Honor. The man who fell says he was carrying two bottles, another deposition indicates that he doesn't know. They may have been just packages.

The Court: All right.

Mr. Krause: Your Honor, there is a good deal of testimony that there were a lot of packages among the men on the [121] ship. That's in the depositions.

The Court: All right.

Mr. Krause: Other packages than whisky.

Q. (By Mr. Williams): Captain, you have mentioned how a seaman or a crew man would get off the Jacob's ladder when he went over the rail and the ladder was fixed over the rail?

A. (Witness nods head.)

Q. Now, suppose the ladder was tied up on the boat deck and the seaman desired to get off on the main-deck level. How would he do so?

A. Well, he would climb the bosun ladder to the top of the—of the gunwale——

Q. Yes?

A. ——and then he would work himself in between the boat deck and the gunwale which there is an opening in there big enough—plenty big for a man to get through. But, there would be a—lot



(Testimony of Captain M. D. McRae.)

harder to get in through that way than to come over the gunwale.

Q. It would be harder to do that? A. Yes.

Q. Get off at the main-deck level?

A. Because you have got then to reach up on top before you can get a hold of—through this to hold on, come down in. There is an opening through the stanchions which is plenty [122] big to get through but you have got to have something up on top to hold on to drop down to the main deck.

Q. Would a man have to be in a crouch to get through that opening? In other words, could he stand up on top of the railing and not hit his head on the boat deck?

A. No. Oh, no, he couldn't do that. He would have to—he would have to—I wouldn't exactly say crawl in there but he would have to bend down a little to come in through there. He wouldn't have to crawl through it. He couldn't stand up there by any means.

Q. Yes. Captain, what do you consider a safe method to use for crew members returning from shore liberty? A. Accommodation ladder.

Q. Well, no. Just a moment. I hadn't finished, Captain. A. Oh.

Q. If a Jacob's ladder is to be—is to be used, assume that that's going to be used, how would you conduct that operation in safety? The men returning back in the liberty launch, how would you get them safely aboard?

A. You mean as far as the time of coming

(Testimony of Captain M. D. McRae.)

aboard the—or setting up the Jacob's ladder from the launch until they arrive aboard the ship?

Q. Yes. Would you use any special precautions?

A. Under certain conditions, yes. Special—it depends on the weather and the sea quite a bit. Now, a little boat [123] like that or liberty boat, if the sea is running quite heavy——

Mr. Krause: Well, your Honor, the facts are that it was smooth. Now, do we have to consider all those other angles too?

Q. (By Mr. Williams): Well, assume——

The Court: Yes, I think——

Mr. Krause: Their testimony was that it was smooth.

Q. (By Mr. Williams): We will assume that the water there—the ship is in a protected harbor and perfectly smooth.

A. Perfectly smooth?

Q. Yes?

A. O.K. Well, the man comes up the bosun's ladder just like climbing any other ladder. He comes up hand-by-hand, foot-by-foot, and step-by-step until he gets to the top, ordinarily, one man at a time coming up the ladder.

Q. Well, how would you see that those rules as far as one man at a time are carried out?

A. That is the deck officer's of the vessel—that's what I say, he should be there and see that that's done.

Mr. Krause: Your Honor, may I move to strike that on the ground that there is no charge here that two men were going up at the same time? There

(Testimony of Captain M. D. McRae.)

was one man going up and that's all. That's the charge and that's all the evidence is so far too.

Mr. Williams: Well, I don't believe his testimony covers [124] that. He just simply described certain safety precautions which should be followed and I asked him how they should be carried out and he said by the deck officer.

The Court: Let me have the question and answer, please.

(Last question and answer read by the Court Reporter.)

Mr. Williams: I will——

The Court: Is it your contention that there was more than one man going up?

Mr. Williams: No, sir. I will concede counsel's objection.

The Court: The objection to the question is sustained and the answer is stricken from the record and I will disregard it.

Q. (By Mr. Williams): Captain McRae, is it a safe thing for a man climbing the Jacob's ladder to carry packages so that both hands are not free?

A. Certainly not. Absolutely not.

Q. How would you see that that rule was carried out as men came aboard the ship from shore liberty?

A. That, again, comes down to the man that is supervising the crew coming aboard.

Q. That is what man?

A. The deck officer.

Q. Or his designated—— [125]

(Testimony of Captain M. D. McRae.)

A. Or he would designate a representative which would be one of the deck crew, an AB or ordinary seaman, or whatever they might be, or the watchman. Some ships carry a watchman.

Mr. Williams: That's all.

The Court: Cross-examine.

### Cross Examination

Q. (By Mr. Krause): This deck officer, then, or whoever is up there is to lean over the rail and see what each man is doing as he comes up?

A. That is correct.

Q. That is what he has to do?

A. Yes, if he can't see any otherwise.

Q. Well, how would he see him?

A. Well, if he is tall enough he could see over the rail without bending over but if he is a short man he would have to bend over to see.

Q. All right. And, he has to stand there and see whether any man is carrying a package while he is coming up the ladder?

A. If he couldn't his eyesight would be awful bad.

Q. What?

A. His eyesight would be awful bad if he wouldn't.

Q. Well, all right. That's your testimony that he should be there to do that? [126]

A. That's right.

Q. Did you ever do that yourself when there was a liberty party coming back aboard ship?



(Testimony of Captain M. D. McRae.)

A. I certainly did.

Q. Oh, you did? A. (Witness nods head.)

Q. What is the date of your license, Captain?

A. The date of my license?

Q. Yes.

A. My license is renewed every five years.

Q. Well, the date of the last one?

A. The date of the last one? 11th day of December, 1951.

Q. 1951? A. Right.

Q. Your Master's license was first issued to you in what year?

A. This is the fourth issue of the Master's license.

Q. Fourth issue?

A. Five year every year—five year every issue, I mean.

Q. Yes. Now, how long did you sail as a Master, Captain? A. Ten years.

Q. Ten years? A. Uh huh.

Q. And you last sailed as a Master in about 1946, is that right? '45? [127]

A. '45. Summer of—spring of '45.

Q. What type of vessels were you on during the war, Captain? A. Liberty.

Q. Liberty? A. (Witness nods head.)

Q. Were you mostly out in the Pacific?

A. No. No. I was all over the world.

Q. You were where? A. All over the world.

Q. All over the world?

A. Australia, Mediterranean, India; any place

(Testimony of Captain M. D. McRae.)

you can mention with the exception of the British Isles. I wasn't to the British Isles.

Q. Your last time at sea, under what rating did you sail when you were last at sea?

A. Master.

Q. As Master? A. (Witness nods head.)

Q. Now, Captain, your familiarity with the duties of members of the crew and the officers, particularly, is based upon your experience at sea, I suppose?

A. Not exactly. It's based upon my examination from a Master's license.

Q. You were examined at that time with respect to the obligations of the various officers, were you? [128] A. I certainly was.

Q. When you took your Master's license you were examined with respect to the obligations of the engineer officers?

A. I was examined for the duties of an engineer officer, not——

Q. As to the duties of an engineer officer?

A. Absolutely.

Q. I noticed that while you were so specific at the outset in saying that these men were not officers properly you have been using the term officers yourself all through your testimony.

A. That is correct. As I say, it's something like you call more so to—it's a nickname aboard the ship now. It's been handed down from year to year. But, where it started from I do not know. But, actually, on the articles and on the license it don't say officer.

(Testimony of Captain M. D. McRae.)

Q. In all of the contracts between these unions and the employers association they refer to licensed officers associations, don't they?

A. Licensed—our name of our organization is the Masters, Mates & Pilots. Not Masters, Officers & Pilots but Masters, Mates & Pilots.

Q. My question is whether the mates and engineers were not always referred to in these agreements as licensed officers? [129]

A. They might be referred to under that—under certain conditions but in the final analysis of what the men are aboard the ships they're given their proper name. It is mates and engineers.

Q. All right. Now, what difference does it make whether you call them officers or mates and engineers, Captain?

A. Well, if you went up to get your license and you ask the United States Coast Guard inspector to put Chief Officer on your license instead of Chief Mate he would laugh at you.

Q. Do you consider because of that distinction that you are making that that affects the officers' or the engineers' duties and obligations?

A. Will you state that question again?

Q. Well, did you shy away from the term officer in order to minimize the obligations that the engineer—

Mr. Williams: That is objected to as argumentative.

The Court: Well, counsel has assumed some-

(Testimony of Captain M. D. McRae.)

thing by way of—oh, this is cross-examination. He may proceed.

Q. (By Mr. Krause): Is that still too vague, Captain?

A. I just didn't get it exactly what you meant.

Q. Tell me why you told us the difference between—why there was anything wrong about calling them officers. Why was that?

A. I didn't say there was anything wrong with calling them an officer. You can call them what you like. But I said [130] what the term—the term of the men in the licensed department aboard the ship—I said what their license calls for and what the articles they sign calls for. You can call them any name you want to.

Q. And you don't consider that either term has any effect upon their obligations and duties whether you call them officer or mate?

A. Just because you might call a horse a mule don't change his occupation, does it?

Q. Well, I'm sorry. I haven't yet found out why you said that. But, nevertheless, do the mates and the engineers as well as the Captain have any obligation for the protection of ship, cargo, and crew?

A. Engineers has got no obligation as far as the ship's cargo is concerned. They have an obligation for the crew when they're on duty and in the engine room when the engine room crew is off duty and in their rooms. On deck they come under the Master



(Testimony of Captain M. D. McRae.)

and whoever is in charge of the deck if any trouble comes up.

Q. Well, to be more specific, if an engineer officer, particularly the second assistant, sees a member of the steward's department doing something dangerous that might result in injury to that member of the steward's department does the second assistant engineer have any duty to warn him? [131]

A. Well, he has a duty as a man standing by seeing another man that is going to get injured to stop it. But, it's not his duty to break into anything unless it becomes dangerous. His duty then first of all is to notify the deck man that's in charge of the deck or the Master and then if the Master can't take care of it alone he can deputize anybody on the ship to help him.

Q. Well, my question was rather confined to whether the second assistant engineer had a duty to warn the man right while he is doing this negligent act?

A. Duty only as a human being, I would say, that a man wasn't gettin' beat up or killed.

Q. All right. Well, then, as far as being second assistant engineer is concerned he has no duty to warn the man against his negligence that might produce an injury?

A. Not unless he is in the engine room on watch.

Q. I am talking about the case where he is not on watch?

A. That's right. He has no special duty. No, he has not.

(Testimony of Captain M. D. McRae.)

Q. All right. And, if he saw this member of the stewards department doing something that was endangering the safety of the ship does he have a duty to warn him and stop him from doing that?

A. He has no duty outside of like I said just like a human being seeing somebody going—putting themselves in danger or endangering another man. But, he has no official duty. [132]

Q. All right. He has no duty to protect the ship against injury or loss, then, if he sees some member of the stewards department while this engineer officer is off watch to warn him against doing that thing that might cause the loss of the ship?

A. As a member of the crew he is supposed to report anything to the man that is in charge to take care of those instances. But, as I stated in the first place, if it comes to a dangerous point, well, naturally, the man should step in if anybody—he sees anybody that's going to get hurt or going to—and help him from gettin' hurt if he can. But, he has got no official duty when he is off watch and except he is in the engine room.

Q. Now, you said that climbing a pilot's ladder with hands encumbered was a dangerous thing?

A. Absolutely a dangerous thing.

Q. Then, is it a safe thing to stand under such a ladder while a man is going up in that way?

Mr. Williams: Object to that question unless he specifies some knowledge on the part of the person who was standing under. I feel that's too general.

(Testimony of Captain M. D. McRae.)

The Court: Well, I think he will admit the facts of circumstances. May I have the question?

(Last question read by the Court Reporter.)

The Court: Well, this witness testified about the [133] man falling and falling straight down. You may inquire.

Q. (By Mr. Krause): What do you say, Captain?

A. Will you state the question again, please?

Q. Is it a safe thing for a man to stand under the pilot ladder while another man is going up so encumbered?

A. It's not considered to be a safe thing for a man to stand directly underneath the ladder, no; absolutely not directly underneath. Certainly, sometimes they do. There are certain conditions where if you want it that way where a man does stand and steady the ladder, well, he is bound if he stands right there and holds on.

Q. Just a moment, Captain. That was not asked for by the question and it is not in this case because there is no claim made that anyone was steadying the ladder. . . . A. All right.

Q. Now, as you said before, standing within five feet of the ladder was in a place of danger?

Mr. Williams: Object to that. That is not his testimony. That is counsel's conclusion. But, it was not the testimony.

The Court: All right. We will have to search the record.

Q. (By Mr. Krause): May I put it this way:

(Testimony of Captain M. D. McRae.)

Was it your testimony that standing within five feet was in the danger zone?

A. I did not testify to that that I know of. [134]

Q. You didn't say that?

A. Not that I know of. You will have to go back because I do not remember of testifying like that.

Q. All right. Then let's start and ask you what is the danger zone under the ladder under those circumstances?

A. Well, as I said before, it is all the way—depends on the way that the man falls.

Q. I am asking you for the danger zone. We don't know how he is going to fall. What is the danger zone around the foot of the ladder?

A. Well, I would consider if he was standing five feet away from the ladder I would consider that to be a safe distance.

Q. All right. Then, as you explained before, if he lets go with his hands and falls outward he would land on the man in that position, wouldn't he?

A. He would, to a certain extent, yes, he would——

Q. Yes?           A. ——if he fell that way.

Q. If he fell outwards he would land on the man at a distance of five feet?           A. Yes.

Q. Now, isn't it a cardinal rule on board ship never to stand under a ladder when another man is going up?

A. Well, it is a cardinal rule for nobody to



(Testimony of Captain M. D. McRae.)

stand under [135] a ladder, but it's not lived up to all the time.

Q. Now, that may be another thing, Captain.

A. Yes.

Q. But, it is a rule, isn't it?

A. Well, it is a rule that you're not supposed to stand under a ladder all right when another man is going up.

Q. But, the reason for that is that it isn't only the negligence of the man in letting go of the ladder that might cause injury but the ladder might break or the fastenings part or a rung come out, isn't that correct?

A. Well, you're not supposed to use ladders that break.

Q. What?

A. You're not supposed to use any ladders that break.

Q. But, they do sometimes break, don't they?

A. That's right, they do sometimes.

Q. Now——

A. All machinery breaks down at some time, you know.

Q. When you were Master of the ship what sort of gear was used for putting men over the side to put them onto the staging platforms?

A. Oh, that's—we always use bosun ladders for that, that's principally one of the things, bosun's ladder. Or, for—that's for the crew when they're painting over the side of the ship. They don't paint from the bosun ladder, they just use the bosun's

(Testimony of Captain M. D. McRae.)

ladder to go down and go up from [136] the staging.

Q. They use the ladder to go over the side to get down onto—— A. Onto the staging.

Q. Onto the staging? A. That's right.

Q. And, is that done while the men are out over the water?

A. That's done while—pardon?

Q. The staging is hanging out over the water?

A. The staging is hanging down the side of the ship.

Q. But, it is out over——

A. Naturally if it's out over the side of the ship it's out over the water.

Q. Out over the water. Is that done while the ship is under way? A. No, sir.

Q. They aren't put out on the staging while the ship is under way? A. No. No, never.

Q. But, while they're at anchor in a harbor do they put them out on the staging to paint them?

A. If it's smooth weather and nice weather, but not in rough weather.

Q. But, now, how do the health officials and immigration officials, et cetera, come aboard the vessel—or, did they, [137] while you were Master of the vessel?

A. Well, I don't suppose the vessel I was Master of was any different from the rest.

Q. What did they use to get aboard?

A. Sometimes they climb aboard in a Jacob's ladder and other times they demanded that the

(Testimony of Captain M. D. McRae.)

accommodation ladder be put out for them to come aboard.

Q. They demanded the accommodation ladder?

A. Yes. That's correct.

Q. Where is that that such a demand was made?

A. On the entrance to the Hooghly River on going up to Calcutta the pilots said they wouldn't come aboard until I put the accommodation ladder out.

Q. The Indian health officials?

A. No. They were British pilots.

Q. A British pilot wouldn't come aboard?

A. He was under the pilots for the Calcutta River—or, the Hooghly River up to Calcutta there. Not all of them are British pilots, some of them are Indian pilots too.

Q. I didn't understand, Captain, was it the pilot that demanded the accommodation ladder or was it the health officials?

A. No; both of them. All of them.

Q. All of them. I see. But, ordinarily and particularly in American ports here they come aboard by means of the [138] pilot ladder, don't they?

A. Well, as a rule they do but there are some ports in America where they demanded it too.

Q. Mexico and South America?

A. Mexico and South America is very definite that they demand the accommodation ladder.

Q. That's correct. But, when you come from a foreign voyage into the Columbia River, the Willamette River, the health officers and the immigra-

(Testimony of Captain M. D. McRae.)

tion inspectors come aboard by the Jacob's ladder, do they not?

A. If they—if the ship anchors in the stream, waits till the morning, she comes alongside the dock, they come aboard the ship right alongside of the dock, not out in the stream.

Q. Well, is the ship permitted to dock before the health examination has been made?

A. That is correct.

Q. Here in Portland?

A. That is correct. But, nobody is allowed to go aboard.

Q. Nobody is allowed to go aboard and nobody is allowed to get off?

A. To come ashore, that's right. The ship is allowed to dock, though.

Q. Have you been on a vessel, Captain, when the health officers and immigration officials boarded the vessel right here in the Willamette and Columbia rivers by means of the [139] pilot ladder?

A. Yes, I have had them board the ship by means of a pilot ladder.

Q. Is that the usual way they board?

A. Not usually. If the ship comes direct from sea and comes right up here to Portland, she anchors overnight and she can't clear here before six o'clock in the evening, wait till morning, comes to the side of the dock at six o'clock and then they board her right at the dock, come aboard on the regular gangway.

The Court: May I make just a point of inquiry?



(Testimony of Captain M. D. McRae.)

Is the Master of a ship flying the American flag permitted to bring his ship right up to Portland without a Columbia River pilot?

The Witness: Not now.

The Court: Well, that is what I was wondering.

The Witness: He was asking about immigration.

Mr. Krause: We were talking about health and immigration officers.

Q. The pilots all come aboard by means of pilot ladders? A. Not always.

Q. In American ports, then?

A. Not always.

Q. Not even in American ports?

A. Not always.

Q. Well, if the pilot is taking her down the river obviously [140] he boards at the dock where the ship is leaving, how does he get off down at Astoria?

A. He gets off down at Astoria with the Jacob's ladder all right unless the ship is going to dock at Astoria and then he gets off the regular gangway.

Q. All right. Now, then, when the river pilot gets off at Astoria and the ship is going to sea the bar pilot goes up the pilot ladder, doesn't he?

A. Unless she is at the dock. Yes, he goes up the—he goes up the——

Q. Yes.

A. But, take it in this circumstance and that pilot comes up and said he didn't want to go up the Jacob's ladder we would have to put an accommodation ladder out for him.

(Testimony of Captain M. D. McRae.)

Your Honor, I think I made a little mistake in my answer to you that a ship coming from sea—the Master can take that ship up the river without a pilot if he wants to take that ship.

The Court: Oh. He can?

The Witness: He can coming from sea.

The Court: I had just always understood that he had no authority.

The Witness: He has got the license to do it.

Mr. Krause: The Master himself is excluded.

The Court: I see. [141]

Mr. Krause: You couldn't have anybody else do it without having a license.

The Court: Thank you.

Q. (By Mr. Krause): Now, you said that men returning after they had been on shore after months at sea are usually not half lit up but all lit up. That was the statement you made advisedly, wasn't it?      A. That's correct.

Q. I suppose that goes for the licensed officers as well as the members of the crew, doesn't it?

A. Well, no, I wouldn't say that. It's possible that it could happen but he wouldn't last very long under my command if he came back like that.

Q. Then, this statement of yours that they are not half lit up but all lit up would apply only to the unlicensed personnel?

A. That's right. That's what it would apply to. But, then, there are exceptions to the rule. They could come back plastered too.

Q. Now, I believe that the facts in this case—

(Testimony of Captain M. D. McRae.)

and that is the only evidence I have heard—is that this Jacob's ladder was made fast to the boat deck and—— A. I——

Q. ——and therefore the ladder would continue right on past the main deck up to the boat deck, wouldn't it? [142] A. That's correct.

Q. All right. Now, then, when a man is going to get off on the main deck why doesn't he hold onto the ladder until he gets off onto the main deck?

A. Well, he could hold onto the ladder all right but he has still got to crawl in through, he has got to let go of the ladder because the ladder is on the outside of the ship, not on the inside.

Q. How high is that rail there on the main deck ordinarily? A. You mean the gunwale?

Q. Yes. Well——

A. The bulwarks, I mean?

Q. The bulwarks.

A. Well, run about four feet high, it depends. That's just about the average height, four feet.

Q. About four feet high?

A. About four feet high.

Q. Therefore, the ladder would only be out of his reach after it was down to that point below the bulwarks, isn't that right?

A. Well, he has got to climb up the ladder till he gets his feet level with the top of the bulwarks in order to get in through.

Q. And all that time he hangs onto the pilot ladder, doesn't he? [143]

A. Well, until he starts to get in, he has got to

(Testimony of Captain M. D. McRae.)

let go of it. But, he can't come in under the boat deck without letting go of the ladder some time. He can't take the ladder in with him.

Q. If a man is of ordinary size, five foot five, six, seven inches, do you mean to say he has to let go of the ladder before he is standing on the deck?

A. He is up—when he is coming in his feet is on the top of the bulwarks, four feet up, he has got to drop down with his feet or else he comes—he can let himself down hand-over-hand, maybe, on the ladder but one half of his body is still outside of the bulwarks then and the other half is inside. It would be a comical way for anybody to come in from a bosun—I—if I caught somebody doing that, why, he would certainly catch the devil from me.

Q. He can jump down four feet and he can hold onto the ladder all the time, can't he?

A. Well, unless he turns around some way or back, I don't see how he could do it. It's possible to be done, all right, I can see that, but it wouldn't be a very feasible way for a man to come in off a bosun's ladder. I certainly would say that if I caught somebody doing that they certainly would be told he was to come in.

Q. Well, you tell us now how you would tell him how to come in. [144]

A. What?

Q. You explain to us now how you would tell him.

A. We haven't got a bosun's ladder rigged up from the boat deck. I can show you how to tell a man how to come in.



(Testimony of Captain M. D. McRae.)

Q. No. But, I want you to explain it to me. It was rigged to the frame of the boat deck and went past the main deck? A. Yes.

Q. Now, how would a man under those circumstances get down onto the main deck from the ladder?

A. In the first place, as far as the man gettin' in, he gets in the best way he can. It's no feasible place for—for a bosun's ladder to be fastened to the boat deck and the man to have to come up and come in under that condition. It's no feasible place for that bosun's ladder to be made fast in the first place. The condition of a man coming up in through that—under that condition is some way that is just works it in. There is a different way you can come in but it just don't make sense in having the bosun ladder rigged that way only for lifeboat drill. When we use it for a lifeboat drill for the men coming down from the boat deck to the lifeboat in the water, then he comes onto the bosun's ladder from the boat deck, he don't come on from the main deck.

Q. All right. When you make it fast to the bulwark at some other point or right there in under the boat deck then you say you have nothing to hang onto when you climb over [145] the rail, is that correct?

A. Up above if you can grab a pipe or something, yeah. But, generally—pipes running along under the main—under the boat deck, you can grab a hold of one of those pipes and hold onto it and lower—drop yourself down——

(Testimony of Captain M. D. McRae.)

Q. Yes?

A. —onto the main deck. Well, they are all right.

Q. All right.

A. There is something there. But, if there is nothing there to hold onto you have got to get in the best way you can.

Q. So, if you have the ladder there to hold onto, that isn't any good?

A. Not in the final analysis of getting down onto the boat deck, it isn't. It's all right to get you up there to a point. Where you got to get in and get under the boat deck it doesn't do you any good.

Q. Now, Captain, to get you down to some specific questions, the second assistant engineer was on a liberty launch that had come back from the dock at Sasebo. Are you familiar with that harbor, Captain?

A. To a certain extent. It's been quite awhile since I have been there.

Q. It was one of the big Japanese naval harbors, wasn't it? [146]

A. Yes, that's so.

Q. And, it's a landlocked harbor, is it not?

A. To a certain extent, it is, yes. Not exactly landlocked but all harbors are landlocked to a certain extent if you want to call it that way unless it's an open harbor. An open harbor is a harbor where it's open to every wind that you want to blow. Otherwise a harbor is landlocked because that is the reason it's called a harbor.

Q. The water was smooth?

(Testimony of Captain M. D. McRae.)

A. I wasn't there to know whether the water was smooth or not.

Q. No. But, I am asking you to assume that these are the facts, Captain. A. That's right.

Q. Yes. The launch was 25 to 30 feet long and from 7 or 8 to 12 feet beam, those are the different estimates. A member of the steward's department is climbing the ladder with one bottle of whisky under his left arm and clutching another bottle of whisky by the neck in the right hand and he is going up a pilot ladder in good condition with the light so that you could see every step.

A. I don't—you want me to answer that?

Q. Well, there isn't any question yet.

A. Uh huh.

Q. That type of thing you said was a dangerous thing [147] to do, didn't you?

A. I certainly did.

Q. All right. Now, the second assistant engineer is standing down on the launch while this is going on and standing four or five feet from the foot of the ladder. What duty, if any, did the second assistant engineer have under those circumstances?

A. None.

Mr. Williams: I am going to object to the question, your Honor, because it does not cover the element of knowledge. His duty could only depend on what knowledge he has of the man in this position that he has described. If he wants to ask about his duty to observe him or if he had observed him,

(Testimony of Captain M. D. McRae.)

what his duty is, I have no objection. But, he leaves it wide open this way.

The Court: Well, I assume if you take the witness' major premise that most of the men coming back would be half crooked I suppose the witness is supposed to be entitled to know what the condition——

Mr. Williams: Well, what about the bottle and all that? I mean, this man on the ladder which he has described—you can't——

The Court: I think it is more argumentative as to the weight of the thing rather than the admissibility of the question. But, so that the witness would have the benefit [148] of the doubt please include in your hypothetical, if you know, what opportunity the second assistant engineer had of knowing or observing the member of the steward's department climbing the ladder.

Q. (By Mr. Krause): You may assume that the second assistant was sober, he had had a drink of beer ashore, he says, and he is standing on the deck of the vessel with an unobstructed view four or five feet from the base of the ladder with an unobstructed view of the ladder and the man climbing the ladder. Now, what if any duty did the second assistant engineer have with respect to the man climbing the ladder and with respect to himself?

A. As far as the duties of the second assistant, when he was aboard that launch, as I stated before, he was aboard that launch as a passenger only.



(Testimony of Captain M. D. McRae.)

Q. All right. Then, with respect to the man climbing the ladder he had no duty?

A. Not at all unless the Master or somebody from the——

Q. All right.

A. ——give him authority to tell that coon, or whatever he was, to get the heck off the ladder with them two bottles of whisky and go up without them.

Q. All right. He had no obligation to the man climbing the ladder, no duty?

A. Right. [149]

Q. Now, what was his duty with regard to himself?

A. You stated that the boat was around ten feet wide, he was five feet away from it, he was right in the middle of the boat. I think he exercised his duty to keep away from the ladder as well as he could without going clear over on the other side of the boat which is only ten feet wide, you said.

Q. Well, it might have been less than that.

A. Might have been more too.

Q. The estimates are from six to seven feet to twelve feet wide.

A. If he had to go more than seven feet and the boat was only seven feet he would have to walk over the side of the boat——

Q. Yes?      A. ——on the water.

Q. And, the ladder split the launch about midships or, that is, about in the middle fore and aft and the launch was 25 to 30 feet long.

A. Generally those launches are built so the

(Testimony of Captain M. D. McRae.)

space for the passengers is all on the after end, the pilothouse is forward, and takes up about half of the boat. The other half of the boat is open and there is where the crew all gather——

Q. All right.

A. ——in the after end of the boat. [150]

Q. All right. Then, we will say if he was standing within five feet of the base of the ladder, under those circumstances he was taking all precautions for his own safety that you would suggest?

A. Well, I would consider that if I were standing five feet away from the ladder I would be safe under conditions——

Q. You would consider yourself safe?

A. Yes. Because, anybody can drop down and come on top of the whole bunch of them there, the fact that he came on top of three men, he didn't come on top of one, as far as I can understand.

Q. All right. Then, the statement I made—as far as you're concerned there were no other precautions that the second assistant engineer should have taken?

A. I can't see any that he should have taken.

Mr. Krause: That's all we wanted to know. Thank you.

Mr. Williams: Is that all your questions?

Mr. Krause: I am through, yes.

The Court: Redirect?

Mr. Williams: Yes.

(Testimony of Captain M. D. McRae.)

Redirect Examination

Q. (By Mr. Williams): Captain McRae, is it the duty of a second assistant engineer to give instructions to a member of the steward's department, let's say, a third assistant cook, as to how a [151] Jacob's ladder should be climbed? Is that part of his duty aboard the ship? A. Certainly not.

Mr. Krause: Well, Your Honor, that, of course, is a general question. He has already specifically testified that the officer has no duty.

The Court: Yes. I think you covered that pretty well in your direct.

Mr. Williams: I want to get to the point of whose duty, Your Honor.

The Court: Well——

Mr. Williams: I will withdraw the question.

The Court: This witness testified fully as to whose duty it was to supervise the boarding of the ship.

Mr. Williams: But, I meant, though, as a matter of instructing, training, and things of that nature.

The Court: Is that a matter of issue?

Mr. Williams: Yes.

The Court: Well, let's be advised where.

Mr. Williams: First of all, we contend in Contention 2e that respondent was negligent for having failed to instruct crew members of said vessel as to a proper and safe manner in which to ascend or descend the pilot's ladder.

The Court: All right. Then, you may reopen your direct examination. [152]

(Testimony of Captain M. D. McRae.)

Direct Examination—(Reopened)

Q. (By Mr. Williams): Who has the duty if such a duty exists aboard a ship to instruct a member of the steward's department as to how to climb a Jacob's ladder? Whose duty is that aboard a vessel?

A. That is the deck—the deck department's duty and whoever might be in charge of the deck, as I stated before, should be there and tell those fellows how to come up a Jacob's ladder.

Q. What I have particular reference to is this, Captain, is in the manner of training men aboard the ship. Now, upon whom falls the duty of seeing that the men aboard the ship are properly trained to carry out their function aboard the ship?

A. That is done at lifeboat drill where they climb up and down ladders to go into the boats when they're lowered to the water.

Q. Yes.

A. There is where the training of climbing up and down a Jacob's ladder is concerned.

Q. Yes?

A. The man in charge of lowering the boat and getting the men into the boat and getting her away from the ship for a lifeboat drill is to train those fellows how to come up and down a Jacob's ladder.

Q. Oh. Is that where inexperienced crew men learn how to climb a Jacob's ladder?

A. That's for all the crew that he has got on that boat. He is in charge of that boat.

Q. Yes?



(Testimony of Captain M. D. McRae.)

A. And, if anything comes up that's his crew.

Q. Well, the entire lifeboat drill is under the supervision of whom?

A. Of the Master.

Q. And, the individual——

A. Individual——

Q. ——boats——

A. ——the first mate, second mate, third mate, has got a boat apiece and then the other one is generally given to the chief engineer to be in charge of that boat. Liberty ship, four lifeboats: first mate, second mate, third mate, and chief engineer.

Q. As second assistant engineer is not in charge of a lifeboat, is he?

A. Not on the ship I was on. There is a possible chance that he could be assigned in charge of a lifeboat on a big passenger ship.

Q. Yes?

A. But, where there is other officers to take over without putting one of the assistant engineers in charge, it's—in [154] the case of a big passenger boat even the bosun is assigned to a lifeboat to be in charge of a lifeboat. A steward or one of the the stewards or the purser on a big passenger boat is even assigned to a lifeboat where they carry, oh, let's see—sometimes as much as twenty lifeboats on a big passenger boat, maybe more.

Q. Captain, if a man is climbing a Jacob's ladder and his hands are encumbered by packages or bottles and he has something in one or both of his hands, would that render more difficult getting off

(Testimony of Captain M. D. McRae.)

the Jacob's ladder at the main-deck level when the Jacob's ladder was rigged to the boat deck?

A. Personally, I don't see how the guy ever got started up the bosun's ladder with a bottle under one hand and a bottle under the other hand. I don't know how it happened.

Q. Well, just assume that happened. Would the presence of those things in his hands render getting around there more difficult?

A. Why, certainly it would. Absolutely.

Q. It is true, isn't it, that he would have to step around the edge of the ladder, the side of it, to get off onto the rail, wouldn't he?

A. He has got to get—he has got to step off it and get his leg over the top of the—of the bulwarks and get over—his leg over the top. Naturally, he has got to step off the ladder. Whether he steps off it directly straight up or goes [155] over sideways, he has still got to reach up and get his foot over the bulwark.

Q. What I mean is this, Captain, he is climbing the ladder and attempting to get off at the main-deck level and the ladder goes on up to the boat deck?

A. Oh. Oh. Oh. I see what you mean now.

Q. He would be on the outboard side of that ladder, wouldn't he?

A. Certainly. Yeah. I thought you were——

Q. He would have to go around it, wouldn't he?

A. I thought you meant when the ladder was fastened to the main deck.

(Testimony of Captain M. D. McRae.)

Q. I don't mean when he is going over the rail, I mean when he is getting off it.

A. Yes. He climbs up the ladder directly to the top of the bulwark, anyhow, and then how he gets in from there, well, it's a different story.

Q. Well, the ladder would be fastened up on the boat deck and otherwise it's hanging free, is it not?

A. That's right.

Q. That's the normal way of rigging?

A. It's hanging free from there on.

Q. And as he steps off it it could very easily sway or move, could it not?

A. Oh, yes. Sure. Very easily sway. [156]

Mr. Williams: I have no further questions.

The Court: The cross-examination?

Mr. Krause: I have none.

The Court: That's all, Captain. You may step down.

We will take a five-minute recess.

(Recess taken.)

The Court: Libelant's next witness.

Mr. Williams: Call the libelant, your Honor.

### JOHN FARLEY

produced as a witness in his own behalf, having been previously sworn, was examined, and testified as follows:

#### Direct Examination

Q. (By Mr. Williams): Mr. Farley, when you were last on the stand I believe you testified up to the point of your injury aboard the liberty launch

(Testimony of John Farley.)

and you stated that you were taken to some hospital at shore, did you not?

A. I was taken to the Army hospital.

Q. All right. What occurred following that?

A. They took me there and they examined me.

Q. In the Army hospital?

A. In the Army hospital.

Q. Where?

A. In a room where they just——

Q. No. I mean, is this in Sasebo, Japan?

A. That's at Sasebo.

Q. All right. Go on.

A. And then they taken me down and X-rayed me and told the men that brought me over that I wasn't going back to the ship, that I had my clavicle busted. I don't know nothing only just what they told me, see. And, my back was injured. And then——

Q. How long were you there? [158]

A. I was there from the 6th and left there the 24th.

Q. Of April?           A. Or, 25th of April.

Q. Now, during that time what was done for you? Were there any braces put on you or what further medical treatment did you have?

A. They sand-bagged my back there and after about ten days they taken me out and took another X-ray and put a brace on me, cast— a regular cast on my shoulder. And then I stayed there awhile, maybe eight or ten days longer, and then they says I was going back to the States.

Q. Now, while you were at Sasebo, were you



(Testimony of John Farley.)

placed in any other type of cast other than the shoulder cast for your broken clavicle?

A. No. I just had the shoulder cast on me, that's all.

Q. All right. And, during that time how did you feel, were you in any pain?

A. Well, I had pain in my shoulder and my back has always hurt me.

Q. Yes?

A. But I had most of the pain that was bothering me was in my shoulder. My arm would even turn—you know, just black out from the pain I had. I couldn't even sleep or rest or nothing with the way it was hurting me. I took pills. [159]

Q. Were you given any medication or pills or any drugs?

A. The doctor gave me pills.

Q. Now, you stated that on approximately the 25th of April—the 24th or the 25th——

A. Around the 25th because——

Q. ——you left from there?

A. I left from there.

Q. You were sent——

A. I was sent from there that morning. They taken me out of the hospital that morning and told me I was going to Yokohama and going back to the States. And then they brought me over to a Japanese hotel.

Q. Where, in Sasebo?

A. In Sasebo.

Q. In Sasebo.

A. Brought me over to this hotel. After they brought me up to the agent's office they taken me

(Testimony of John Farley.)

from there and brought me over to the hotel because I couldn't stand up with this cast and hold—both of my arms were like that (witness demonstrates). So, I stayed there in the room and they taken my clothes off and they put me to bed in there on the floor. Then about ten o'clock that night they come up and woke me up and, you know, I was lying there. They was going to wake me up.

Q. When you say "they," who do you mean?

A. The Japanese girl in this hotel.

Q. All right, sir.

A. They took my clothes off and then they come up there and they put them on again and taken me downstairs and they gave me something to eat. And they had a taxicab there for me and the taxi driver, he taken me down to the depot, they put me in this Pullman train and I was on my way then to Yokohama. And on the train there was an Army officer on there and I got some aspirin tablets from him because my arm was hurting me. I couldn't just set there in pain all the time. And then I arrived.

Q. Were you in a bunk most of the time or were you just sitting up, or what?

A. I was just sitting up and walking around in there just to get on my feet now and then.

Q. How long did the train ride take?

A. Twenty-seven hours.

Q. Yes. What time did you get to Yokohama?

A. I got to Yokohama in the morning early, maybe about six o'clock in the morning or five-

(Testimony of John Farley.)

thirty, something like that, and then I went in the depot and I stayed there.

Q. Were you met there?

A. I stayed there in the depot. No, I wasn't met there. I waited for half an hour or so. One of the agents from the company, a young fellow from [161] New York, he came in there and asked me if I was the fellow that came from Sasebo. He says, "I guess you are the way you look," he says. And I says, "Yes, I am the man." So he taken me out of there and he brought me up to Yokohama to the hotel and he went in the back room there in the hotel and got some coffee and we sat there and talked. And then he taken me up to the company office and when I got up to the company office about eight or nine o'clock in the morning I set around there and pretty soon in come the Captain and the Purser.

Q. Who is the Captain?

A. The Captain on the St. Augustin.

Q. An the Augustin Daly?

A. On the Augustin Daly.

Q. What is his name?

A. Carusoe, or something like that.

Q. Is it Caroso?      A. Caroso.

Q. And what happened there?

A. He saw me there and he looked at me and he says, "Gee, John, I didn't know you was in that shape." And, he says, "God! I can't bring you back to the United States. I can't bring you on the ship." So, then, he said, "Did you have anything

(Testimony of John Farley.)

to eat yet?" And I says, "No, I haven't had nothing to eat." So, he says, "Well, come on," he says, "I have got some tickets." So, he brought me over [162] to the Continental Hotel and I went up there and they got us set at the table, the Captain, the Purser, and myself, and they eat their breakfast there too and I had my breakfast there.

So, then, he asked me if I would go out to the ship?

Q. Well, now, who did?

A. The Captain—and get my sea bag that I had aboard the ship. So, I told him, I says, "God!" I says, "I couldn't go out to the ship in this condition. I'd fall out of one of them motorboats if I tried to go over," because I was topheavy—I was heavy on top.

Q. With the cast?

A. With the cast. So, he says, "Well, you go out there," he said, "we got the accommodation ladder down," he says, "and the fellow can bring your stuff down to you and put it in the boat so you can bring it ashore." I says, "No, I won't take no chances going like that." So, they sent the stuff over to me to the hotel.

They got me a hotel room. Then later on they went and got me a room in the Oklahoma Hotel and I stayed in there from the 27th until the 10th.

Q. Of May?

A. 10th. Till the 10th or the 11th of May.

Q. Then where did you go?

A. Then I went on the J. L. Luckenbach. They



(Testimony of John Farley.)

made arrangements for me to go on the J. L. [163] Luckenbach and I came to Vancouver.

Q. Vancouver where?      A. Vancouver, B. C.

Q. British Columbia?

A. British Columbia. And, I arrived there, I suppose, around the 2nd of June, or something like that, I am not sure exactly when it was. I think that's when it was. And then I had some money on me so I went and I paid my own way from Vancouver to Portland, Oregon, because I wanted to get home as quick as I could.

So, the next morning I went up to the U. S. Public Health Service and I reported in up there and Dr. Craig had them take some X-ray pictures of me. And so, then, they sent me right away to Seattle. The next day I left for Seattle.

Q. Where in Seattle?

A. The Marine Hospital.

Q. Is that a U. S. Public Health Service Hospital?

A. That's the U. S. Public Health Service, yes. So, when I got in the Marine Hospital I laid there until about the 20th. They took X-rays of me and then they put a body cast on me and this other cast I had on here that I had on my shoulder I broke that in the hotel after I went ashore.

Q. What hotel where?

A. That's this hotel now in Yokohama where [164] I had breakfast. I was just talking about my cast up here (indicating). When I got in there they asked me where my cast was on my shoulder

(Testimony of John Farley.)

so I told them, I says, "Well," I says, "they had a figure eight made out of gauze and they had it stretched around my arms and around like that (demonstrating) to pull me back. Well, that thing there, I couldn't take no bath or nothing, sweatin' and stuff, so it got to stinkin'." So, then, I told them that's what I did, I took that cast off, I says, because it just——

Q. The gauze?

A. Just out of gauze and paper. He shoved gauze and paper up in it, see.

So, then, they kept me there and they put this body cast on me and then I had this big cast put on me then from the top of my neck down to my——bottom of my rumpus.

Q. Yes?

A. And, then, I stayed there awhile and then they told me I could come on home for thirty days.

Q. Well, about how long were you in that Marine Hospital the first time you were there, do you know roughly?

A. Oh, I'd say maybe a month and a half or a month, or something like that. It shows in my records how long I was there.

Q. Then, they sent you home for recuperation?

A. Just told me to go on home for a month.  
[165] I could go on home for a month and then come on back again.

So, I came on back and they cut the cast in two.

Q. Took it off?

A. They took and cut it. They took a business

(Testimony of John Farley.)

and cut the cast in two so they could take some more X-rays. So, after they did that then they sent me out and had a brace made and then they put this brace on me and they told me not to take and do any heavy lifting or anything like that when they sent me out with my brace. So, then, I came home again. And then I went back and forth, I don't know how many times I have been up there. That will show in my record how many times I have been there.

Q. Yes. Suppose you tell me about the last time you were there?

A. Well, I went up there on the 13th of July and they took some X-rays of me.

The Court: That is the last, this present month of July?

The Witness: No. This is——

The Court: 1955.

The Witness: No, not in 19—it was two years—1952, I think it was. I don't know. It shows in my record.

Mr. Williams: No. '52 is the year of your injury.

The Witness: In 1953. 1953.

Q. (By Mr. Williams): You first reported in that hospital, you said, about June, 1952? [166]

A. Yes.

Q. And then the last hospital visit was, you say, now, July of 1953?

A. That was '53. Then, a year later——

Q. Yes. All right. Tell us about that.

(Testimony of John Farley.)

A. I reported up there.

Q. Tell us what transpired there.

A. They taken more X-ray pictures of me and I stayed in there for about eight or ten days. And, I was taking therapy treatment, and so I come out of therapy treatment and they asked me to go home and do some light duty and I told them I would. And, he says then, he says, "You can do heavy duty or you can go to work on a ship," he says, "and after that you can go back to work," he says. So, I went down and I tried a light-duty job on a ship.

Q. Just a moment. Am I correct in understanding that they discharged you from the hospital that last time?

A. Yes, they discharged me and told me they did all they could do for me.

Q. Did they discharge you as fit for duty?

A. That's all they could do for me, couldn't do anything more for me.

Q. Couldn't give you any more treatment?

A. Couldn't give me any more treatment.

Q. Yes. And, they said you were fit for duty?

A. They says some words—he used "indefinite" or something like that. I don't know what the word is.

Q. So, what did you do following that after your discharge?

A. Well, I went home and I worked around and I would go out and I'd put my brace on and I'd take and go out and mow some grass and stuff like



(Testimony of John Farley.)

that and Jeez! that hurt my back when I was doing that. So, I'd keep it up anyway and I kept doing work around there and—little bit now and again, and my wife would give me treatments around there because she likes to work around hospitals. And so she gave me treatments. I went and bought me a little electric business.

Q. What is it?

A. It's an electric stimulator.

Q. Like a vibrator?

A. Like a vibrator. I bought that.

Q. Did anyone in the Public Health Service suggest that you get that?

A. They told me to get a heat lamp and put that on my back and it maybe would do me good.

Q. Did you get a heat lamp?

A. So I got a heat lamp. Then I got this vibrator and I put that on there and I find out my back was still hurtin' me all the time and then I figured "Shoot! I'm going to get me another doctor and see what he is going to say about it." [168]

Q. Now, just a moment, Mr. Farley, before you get there. During this time following your discharge did you do any work at all; in other words remunerative employment that you got paid for and, if so, when was it?

A. I went to work aboard of a ship as a night engineer.

Q. When was that about?

A. I think it was in September.

Q. Of 1953?

A. In 1953.

(Testimony of John Farley.)

Q. Two months following your discharge from the hospital, something like that?

A. Yeah. Yes.

Q. How did you do on that job?

A. Well, I couldn't do very good on it. I couldn't shut the valves off. I couldn't crawl in the tunnel and shut the—I was taking water on that night and I wanted to do the work and see if I could and I couldn't cut the mustard. And Ray called me up then to go on another ship.

Q. That is your business agent you are referring to?

A. That's my business agent. He called me up to go on another ship and says, "How did you make out down there?" Well, I told him I had another fellow shut some valves off for me and open some valves. And he said, "John, if you can't do the work," he says, "well, you can't cut the mustard. I can't send you down there." I says, "Well, I just can't do it." [169]

Q. Then, you said that in 1954 you, during '53—the remainder of '53 you were receiving no medical care from anyone in particular following July 13th?

A. I got no—nothing after the 23rd day of July.

Q. Except your home exercises?

A. Just home exercises.

Q. When did you next go see a doctor for treatment?

A. A year afterwards.

Q. About when was that?

(Testimony of John Farley.)

A. Well, I suppose it was 1954, then, I saw a doctor.

Q. Around June, or something like that?

A. July. I suppose July. Maybe June or July I saw a doctor. They recommended me to him up in —my friend out there, Ernie Langley recommended me to him.

Q. What is the doctor's name?

A. Dr. Berg.

Q. What did he do?

A. Well, he taken me and sent me over and had X-ray pictures taken of me and then he asked me, he says, "If you want to take and go get some therapy it would do your back good." So, they recommended me to go to the Portland Rehabilitation Center right here in Portland. Well, I been going to the Portland Rehabilitation Center now for pretty near a year.

The Court: I think this is a good place to interrupt.

Mr. Williams: Fine. [170]

The Court: We will recess until one-thirty. [171]

\* \* \* \* \*

### Afternoon Session

(Court reconvened pursuant to recess.)

The Court: You may proceed.

Mr. Williams: Mr. Farley, will you resume the stand, please?

(Whereupon Mr. John Farley, previously sworn as a witness in his own behalf, resumed the witness stand and testified as follows:)

(Testimony of John Farley.)

Mr. Williams: Mr. Farley, at the noon recess I believe you were testifying concerning going to see a doctor in the year 1954, a Dr. Berg, I believe.

A. Dr. Berg. I went to see Dr. Berg.

Q. And I believe you testified that Dr. Berg prescribed some physiotherapy for you?

A. He sent me over——

Q. At the Portland Rehabilitation Center?

A. He sent me over to have some X-ray pictures taken and I got them back and he talked to me and told me if I go to the Portland Rehabilitation, why, they may can do my back some good. I went over there and I been there for a year, pretty near.

Q. How often do you go to the Portland Rehabilitation Center?

A. I was going five days a week. [172]

Q. For a period of what time?

A. Oh, for about ten months.

Q. Yes?

A. And then I been—taken a tour of light duty at the—around my home running my mower with my brace on and I thought I'd try my back and see how it was then but it still hurts me.

Q. Now, you go now about how often?

A. Three days a week: Monday, Wednesday, and Fridays.

Q. Yes.

A. And, I take medicine all the time. I have got medicine I take all the time.

Q. How do you get in to go to the Portland Rehabilitation Center?

A. I drive my car in.



(Testimony of John Farley.)

Q. From Reedville?

A. From Reedville into Portland, and then when I get done I drove right back home again.

Q. How far is that in and back?

A. About twelve miles.

Q. You mean each way?

A. Twelve miles each way.

The Court: Two to three times a week, you say?

The Witness: I was coming in five days a week and then I stay in three hours each day. [173]

Q. (By Mr. Williams): You are now going just three times a week?

A. Three times a week I am going now for the last month.

Q. And do you go to see Dr. Berg from time to time?

A. I go to Dr. Berg about once a month. I was to him about a month ago.

Q. Yes?

A. And I would go now if this Court — if I wasn't in here. I was ready to go up and see him again.

Q. This was the day you were to see him?

A. Yes.

Q. Has there been any — had Dr. Berg prescribed any medicine for you that you have taken for your condition?

A. Yes, sir. I take medicine all the time.

Q. Do you know what they are?

A. No, I don't. They're some kind of pills. I taken them and now I run out of them and now

(Testimony of John Farley.)

he is giving me some salts—some kind of salts to take.

Q. You don't know what they do or what they are for?

A. I don't know what they're for. I taken them. I been buying them all the time. I buy them myself.

Q. Are they for the relief of pain or for what purpose, if you know? A. I don't know.

Q. You don't know what they're for? [174]

A. I don't know.

Mr. Williams: May I have Libelant's Exhibit Number 9, the medical bills?

(Whereupon the Crier hands the document to the witness.)

Q. (By Mr. Williams): The large sheet of paper there, Mr. Farley, what is that?

A. This large bill is the dates of screening and examination of John Farley and the hours of physical therapy treatment at \$3 an hour for so many hours each week and month. They got it wrote down here. The whole bill is \$903.75. They got that down here. And I paid September, 1954, \$6 and they subtracted that there and it gives it \$903.75.

Q. What is the total amount that you have incurred not counting what you have paid?

A. \$903.75.

Q. That is the total amount? A. Yes, sir.

Q. On which amount you have paid \$6.

A. Which amount I have paid. Well, I have paid all these bills here.

(Testimony of John Farley.)

The Court: Whether he has paid them or not is of no consequence.

Mr. Williams: I realize that, your Honor. I just want to get the total amount. I am not certain of that. [175]

The Witness: The balance is \$903, it says.

Mr. Williams: Yes.

The Witness: And 75 cents.

Q. (By Mr. Williams): And, the other smaller slips there you have do you find some prescriptions there? Now, are those prescriptions that are ordered by your doctor to be filled?

A. The doctor ordered these and told me to get them filled and I have got them filled and I got the bill every time I paid for them.

Q. What are the other bills over there (indicating)?

A. Special examination and X-rays. X-rays, that's what they are.

Q. Yes. What are they, doctors' examinations?

A. Dr. Berg and Kimberley.

Q. Kimberley? A. And Dr. Kimberley.

Q. That is the first one and then what is the next?

A. This here up on top is C. Todd Jessell.

Q. Yes?

A. And that bill there is \$45 for refer to Dr. Berg. Dorsal spine, lumbar spine, pelvis, and right shoulder.

Q. That's for X-ray?

A. That's for X-ray. June. And the next one is

(Testimony of John Farley.)

from Dr. Todd Jessell and is \$35. Dorsal spine, lumbar spine, and right shoulder. [176]

Q. The next is from which doctor?

A. And the next is from Richard F. Berg.

Q. Yes.

A. And it says July the 21st, '54. Examination and report.

Q. You needn't read it all, Mr. Farley.

A. But the bill here is \$65 and—even.

Mr. Williams: May I see that, please, Mr. Bailiff?

(Whereupon the Crier hands the document requested to Mr. Williams.)

Mr. Williams: I think you will find, Mr. Farley, this is ninety-five less the thirty-five dollar credit.

The Witness: Yes.

Mr. Williams: I move the introduction of these exhibits into evidence.

The Court: What is your position, counsel?

Mr. Krause: Well, I have no objection to the identification and so on and I am willing to stipulate that if the persons were called that rendered those bills that they would testify that they were reasonable. There is, however, a bill there for over \$900 for physiotherapy that has continued for a long time and I do want to be able to ask Dr. Berg about that as to the necessity of continuing that for all this period of time.

The Court: Yes, I understand your position [177] about it. I think you certainly have the right to examine the doctor about them.



(Testimony of John Farley.)

I believe as long as this witness testified he incurred those there isn't any evidence before the Court that they were necessarily incurred as of this moment and I suppose perhaps we had better wait for the doctor before you make your formal offer.

Mr. Williams: He has testified that the doctor ordered them for him.

The Court: I know, but that is hearsay and it deprives the party of the right of examination.

Mr. Williams: I would like to introduce in evidence Exhibit Number 5, agreements between National Maritime Engineers Beneficial Association, Pacific Maritime Association, and Alaska Trade, 1950 to the present date.

The Court: Any objection?

Mr. Krause: I have none, your Honor.

The Court: They may be received.

(Whereupon the document mentioned above by Mr. Williams, Exhibit Number 5 was thereupon received in evidence.)

Mr. Williams: I would like to introduce Exhibit Number 6, United States Department of Commerce continuous discharge book for John Farley provided we identify it. There is no question of identity? [178]

Mr. Krause: No objection.

The Court: It will be received.

(Whereupon document mentioned above by Mr. Williams, being Exhibit Number 6 was thereupon received in evidence.)

(Testimony of John Farley.)

Q. (By Mr. Williams): Mr. Farley, when you were discharged from the United States Public Health Service Hospital in Seattle in July of 1953 were you told whether or not you were to go for any further treatment? Were you instructed as to any further treatment which you should have at the Public Health Service?

A. I asked them that when I was there and he told me that they—there is no use going back to the U. S. Public Health Service any longer. He says that "You're as cured as much as we can cure you." That's what he said to me.

Q. Were you instructed not to come in?

A. Not to go up to the U. S. Public Health Service any longer.

Q. Mr. Farley, since the date of this accident how many days have you worked?

A. I just done one work on the ship one night watch, that's all.

Q. The one night watch which you have previously referred to?

A. That's all.

Q. What are your symptoms at the present time? How do you feel? [179]

A. Well, when I stand on my feet any length of time my back starts giving me pain in there (indicating) just like a toothache. And, if I bend over my back hurts me.

Q. Can you bend over and touch the floor?

A. Oh, gosh, no. I can bend down about ten to twelve inches from the floor.

(Testimony of John Farley.)

Q. You say your back hurts you. Now, where is the area where it troubles you?

A. My back hurts me in here (indicating).

Q. Indicating about the middle of your back?

A. About the middle of my back. And, if I put my hand—that's the best I can put my hand back there (witness demonstrates).

Q. You are referring to your shoulder?

A. Yes. When I do that (witness demonstrates) that hurts my back worse.

Q. That is your right shoulder that you have had the clavicle broken on in this accident?

A. Yes, sir. And, I can't put my arm back there.

Q. Well, how is your back now as compared to how it was, let's say, a year after the accident?

A. Well, I can't—I can't see much difference in my back. It just still hurts me.

Q. Is it approximately the same? [180]

A. Yes, sir.

Q. Can you do anything else with your back now that you couldn't do then or is your back about the same in all respects?

A. In my back when I stand up and everything my back still hurts me.

Q. Yes.

A. And I take the treatments and I get out of the treatments and I go home, I can—I'm taking weights and lifting weights and stuff and I do a little more of that. I can raise more now.

Q. Is that part of your treatment?

(Testimony of John Farley.)

A. That's part of my treatment. I can raise more weights now than I did when I first went in there, I can say that much about it. But, my back still hurts, though.

Q. Now, with regard to your right arm or right shoulder, how is that today as compared to, let's say, July of 1953?

A. Well, I can get my arm up in the air now. Before I couldn't get my arm up in the air at all. I used to have to go sideways with it to get it up in the air. And I have been taking treatments with it and exercise with it and I got it now where I can raise it over my head—straight over my head now. But, I can't put it in back of my back, though.

Q. When did your right shoulder start improving? [181]

A. Since I been taking this therapy up here.

Q. This physiotherapy? A. Yes, sir.

Q. That has been since September of——

A. Since August of last year.

Q. Of '54? A. (Witness nods head.)

Q. Can you demonstrate to the Court in what respect your arm or your shoulder has gotten better? In other words, can you indicate what movement you could not do previously that you can do now?

A. Well, I could show you standing up.  
(Whereupon the witness stands up.)

Q. Just turn around and face the Court.

A. When I was in therapy I could get my hands straight out (demonstrating) and now I can get



(Testimony of John Farley.)

them up over my head (demonstrating). Before I could only get them up that far (demonstrating). And I am lifting the weights every day and I get it up to about eight or nine pounds. I take that for an hour every day, therapy in there. And my back, I can bend over—(witness demonstrates). That's as far as I can do and that hurts me in my back now when I do that. My back hurts me settin' in this chair, any place.

Q. Does your back hurt you when you are lying down?

A. My back hurts—don't hurt me when I am [182] lying down. I go home and lay down and my back don't hurt but when I get up and do any work around the house there or I take and feed a few chickens and I run a lawn mower—and I put my brace on when I go out and do that. I put my brace on because I think maybe it will do me good to get out and do some work. I want to go to sea if I could.

Q. Is the strength in your right arm right now the same as your left arm or is one different from the other?

A. Oh, I got more strength in my left arm than I got in my right arm.

Q. Well, how much more? Can you describe that?

A. I couldn't tell.

Q. Are you right-handed or left-handed normally?

A. I am right-handed.

Q. Well, can you describe the difference before

(Testimony of John Farley.)

this accident and after the accident with relationship to the strength in your right arm?

A. I could take a weight, one of them scale weights, a fifty-pound weight, and I could reach down and get it, I can put that over my—over my head. Or I can take a pump and put a steam pump—take a hold of them and throw them on my right shoulder and go down in the gratings in it and put it in the vise and work on them pumps but I couldn't do it now, though. Swing a button set. I can swing a button set, twenty-two pound hammer. [183] But, I'd be afraid to do anything like that now.

Q. Had you had any trouble with your right shoulder previous to this accident?

A. No, sir, I never had none.

Q. You had had no difficulty or pain there?

A. No, sir.

Q. What about your back?

A. I never had no trouble with my back either.

Q. Before this? A. No, sir.

Q. Have you ever been treated by a doctor for any trouble to your back? A. No, sir.

Q. Did you ever injure your back at any time?

A. Not that I remember. I don't think I have ever had my back ever injured.

Q. Yes.

A. I never was in a hospital with it, I know that much.

Q. Yes. Do you have more strength in your right hand now than you had, say, a year ago?

(Testimony of John Farley.)

A. Yes, sir.

Q. And you have more movement of your shoulder——

A. Yes, sir.

Q. ——than you had a year ago?

A. Yes, sir. [184]

Q. Mr. Farley, how long had you shipped as a second assistant engineer, approximately?

A. Well, I got my license in February in '28 and I been sailing pretty near ever since that.

Q. Yes. And, you were fifty-eight years of age at the time of this accident. I believe that's been stipulated, is that correct?

A. Yes, sir. That's right.

Q. I believe it is further agreed as a fact that you were making \$435.89 as a base wage per month at the time of your injury?

A. That's right.

Q. In addition to that I presume you made over that?

A. I used to make an average of—when they been paying Saturday afternoons and Sundays, since they been doing that on the last ship I was on—when they started doing that I made quite a bit of overtime. I paid off of that ship and I only worked eleven months and I had over \$7,600 in eleven months when they started that new scale of pay paying overtime for Saturday afternoons and Sundays.

Q. What was your average overtime that you would make monthly while you were serving on a foreign voyage?

(Testimony of John Farley.)

A. On a foreign voyage it would run maybe \$250 or \$200 a month.

Q. Between \$200 and \$250 a month? [185]

A. You lay in port so many days and you lay around and you get every third night a night watch and you get fifteen hours of it and you get that \$1.86 an hour for every hour you stand and beside you get your regular wages on top of that. And Saturday and Sundays the same way. Every third night you get your night watch.

Q. Yes.

A. And, it is easy to make it. Some ships you get on the companies won't pay no overtime. They just let things go and run down. But other ships you can make all you want to make and I try to make all I can get to work on a ship when I get aboard of one.

Q. In addition to the overtime that you make are you furnished room and board aboard the vessel?

A. Yes, sir.

Q. That's in addition to these other amounts, that's not taken out of the basic pay?

A. No, they don't take that out of your basic pay.

Q. In the year 1951 which was the year preceding your injury do you know how much money you made for that year?

A. According to my income tax, that W-2 form I can tell you what that is. I think that's—I got that. I copied that down because I got that here. In '51 I was on the Trans-Oceanic for eleven



(Testimony of John Farley.)

months at \$7,648.73. That's on eleven months on board of that ship. And I got papers, overtime sheets, that I took home with me and every one of [186] them is my overtime, shows on it what I worked. \$7,648.73.

Q. That amount, does that or does that not include the payment that you get for room and board aboard the vessel?

A. No. That's what they take out for my W-2 forms. That's the wages. That's the wages.

Q. Yes. That's the amount that you actually pay tax on? A. That's what I paid tax on.

Q. It is true, is it not, that you pay Social Security tax on not only that but on your room and board aboard the vessel, also, do you not?

A. I guess that's right.

Q. Well, if you don't know, just say so.

A. I think they take out everything on that Social Security, I guess.

Mr. Williams: May I have Exhibit 7, please?

(Whereupon the Crier hands the document to Mr. Williams and thence to the witness.)

Q. (By Mr. Williams): That first sheet appearing on there, just what is it?

A. This is wages paid to John Farley for service rendered SS Augustin Daly February the 2nd, 1950, to August the 13th.

Q. That is one sheet. Are there other sheets underneath that? A. Yes, sir.

Q. What are they? [187]

(Testimony of John Farley.)

A. That's overtime. That's overtime, John Farley, Trans-Oceanic.

Q. Is that in the year 1951?

A. This is the year 1951.

Mr. Williams: I move the introduction of these exhibits into evidence.

Mr. Krause: Well, I haven't seen them.

Mr. Williams: You have seen the one.

The Court: Show them to counsel.

Mr. Krause: No objection.

The Court: It will be received.

(Documents as described above by the witness being Exhibit Number 7 was thereupon received in evidence.)

[See page 457.]

Mr. Williams: We will ask counsel to stipulate regarding these wages that in February, 1952, and it is already in the agreed facts, that his compensation, basic, was at the rate of \$435.89 per month and that overtime was at the rate of \$1.96 per hour.

Mr. Krause: Well, that's still an agreement but I think that's correct. I will stipulate to that.

The Court: What was the amount of overtime per hour?

Mr. Williams: \$1.96, your Honor. Will counsel further stipulate that on June 16, 1953, the base wage for a second assistant engineer, marine [188] engineer, serving aboard a liberty class vessel was the amount of \$531.23 per month?

Mr. Krause: That's the new scale.

(Testimony of John Farley.)

Mr. Williams: And that scale prevailed at the time all the way up to present from June——

Mr. Krause: That's correct.

Mr. Williams: Will counsel further stipulate that the overtime rate since June 16, 1953, to and including the present date is the amount of \$3.29 per hour?

The Court: All right?

Mr. Krause: I don't know. I don't know whether that is or isn't the record.

Mr. Williams: Do you wish me to read it in from the agreement?

Mr. Krause: Well, there are two rates. Whatever it says in the agreement is the rate and it's perfectly agreeable to me to have it read into the record now.

Mr. Williams: Yes. May I have that exhibit (indicating)?

The Court: Is that Exhibit 5?

The Clerk: Number 5.

Mr. Williams: Exhibit 5, yes, your Honor. On page 25 thereof it reads as follows: "Section 16. Overtime and Penalty Time. Effective 12:01 A.M., June 16, 1953, the rate of overtime pay shall be \$3.29 per hour and the rate of penalty pay shall be \$2.19 per hour." Penalty time we have not contended for, your Honor. It involves certain types of cargoes. [189]

Mr. Krause: Well, that isn't correct. Penalty time is time put in on Saturdays and Sundays when

(Testimony of John Farley.)

the ship is at sea. It has nothing to do with the kind of cargo at all.

The Court: Mr. Farley will probably know that. You ask him as to the overtime rate.

The Witness: No, you're wrong, Mr. Krause. The penalty time, it's like if you take and you're off at dinner time and you worked all day you work your four hours and then you take and you have to take and do other work during the noon hour, that's penalty time. That's what they pay. Standing the night watch and there is no fireman down below, the fireman may be drunk, and you have to go down and stand his watch, why, you get your wages and that's penalty time for handling the hides or sulphur or anything like that on the ship or anything when you are working. That's the way it is. That's penalty time. That's anything like working cargo with sulphur and stuff like that and they just work in hides as penalty time and you are working stuff. Tell you what, in the agreement what it consists of it shows exactly what it consists of.

Mr. Williams: May I have Exhibit Number 7, please?

Your Honor, I am merely going to read the total on this exhibit. This is wages paid to John Farley for services performed on the Augustin Daly, the [190] ship in question, from February 2—it says 1950. I'm sure that's an error. It should be 1952. The date he first went aboard it to August 13, 1952. The total amount of wages alone is \$3,221.26. The



(Testimony of John Farley.)

total of wages and FOAB. Actually that includes his room and board, as I understand it, is \$3,361.11. Of that amount it is shown on this statement that, and also stipulated in the pre-trial order, that \$1,859.79 represents unearned wages from the date of his injury, April 7, 1952, to August 13, 1952, a period of, as your Honor can see, slightly in excess of four months and six days. The balance between the two is the amount for just wages not including room and board and that is \$1,361.55 which it is shown was earned between February 2, 1952, and April 6, 1952, a period of two months and four days.

The Court: Well, is this \$1,859.79 that you refer to as unearned wages, is that the maintenance that he was paid?

Mr. Williams: No, your Honor. Mr. Krause, I am sure, can answer that better. But, as I understand, when a crewman is injured aboard the ship he is paid his unearned wages which is his basic monthly pay exclusive of any board and room, exclusive of any overtime or bonus or anything like that to the end of the voyage.

The Court: I see.

Mr. Williams: I would like to read an entry from the log, your Honor. It is to be found on [191] Sunday, April 6, 1952, of the—I believe I have the rough log of the Augustin Daly. The entry appears in the center of the right-hand portion of the log on that date and the following appears "1859" that is the time. It says "Entered 100 per

(Testimony of John Farley.)

cent bonus zone westbound" and then gives the last——

Q. Mr. Farley, what is a bonus zone?

A. The bonus zone is a zone where you go into—have it in the Articles—the Commissioner writes it out and it shows from one latitude to another you get so much for whatever you're in. Like when you go from Portland, Oregon, and you hit the 180th Meridian you get \$2.50 a day from there. Like you was going to Sasebo you get \$2.50 a day until you get on the other side of another meridian then when you have hit the meridian, whatever that is, then from Sasebo going to Pusan you're in the hundred per cent zone. If you are getting \$439.50 then you get another \$439.50 added onto your wages what you was making. It's a hundred per cent bonus.

Q. It's a hundred per cent bonus of your basic wages?

A. Of your basic wages.

Q. Does it change the overtime?

A. No. Your overtime stays the same.

Q. Your basic wage is doubled?

A. You double your basic wage.

Q. Was that a war zone at that time?

A. That's a war zone, yes. [192]

Q. I believe it is stipulated you were paid your maintenance from June 1, 1952, to July 23—June 1st being the date you arrived back in the United States, apparently—to July 23, 1953, except for periods of in-patient care, hospital care, presumably, at \$8 a day?

(Testimony of John Farley.)

A. The way they do that, when you are in the hospital you don't get nothing while you're in the hospital. When you're on the outside the company gives you maintenance and cure and they give you \$8 a day. So, if you was in town you have your room rent and your board and stuff like that and they pay you for that.

Q. That's when you are an out-patient?

A. When you're an out-patient.

Q. Yes. And, you received that amount up until—for maintenance and cure exclusive of your—the in-patient time in the hospital up until you were discharged from the hospital?

A. Yes, sir.

Q. Which was July 23rd?

A. I got paid up until July the 23rd.

Q. Have you received any pay for maintenance and cure?

A. No, sir.

Q. Have any medical expenses been paid in your behalf by the respondent since that date, July 23rd?

A. No, sir.

Mr. Williams: I believe that's all at this time.

### Cross Examination

Q. (By Mr. Krause): Mr. Farley, you got your first license in February, 1928, and that was a third assistant's license, was it?

A. No, sir.

Q. Got the second assistant's?

A. Yes, sir.

Q. In February, 1928. Then, you have had a renewal on it every five years since that time?

A. Yes, sir.

(Testimony of John Farley.)

Q. You never took the examinations for a higher rating?      A. No, sir.

Q. You're just satisfied to stay a second?

A. Yes, sir. I like the second assistant's job.

Mr. Krause: Now, may I see this Exhibit 6, please, the discharge book.

(Whereupon the Crier hands the document to Mr. Krause.)

Q. (By Mr. Krause): Your discharge book for 1951 shows that you signed on a vessel on the 16th of January?      A. Yes, sir.

Q. You continued with that vessel until 12-15-51 and were paid off at Galveston?      A. Yes, sir.

Q. Now, then, you received your pay until you got back to Portland, did you not? [194]

A. Yes, sir.

Q. So that actually, you received—when did you go back to Portland after being paid off at Galveston?

A. I came right home from—first I quit the ship and the ship paid off in Mobile and then I stayed on the ship until they had a man come from San Pedro, California, a second assistant, to relieve me. They couldn't get anybody there and they asked me if I would do that there as a favor to stay there so they paid me maintenance and wages and transportation back to Mobile if I would stay with the ship. So, I told them I would.

So, I stayed with the ship and they paid me off, I think it was, on the 16th day of that month. What was it?



(Testimony of John Farley.)

Q. And how far past that date did you get your pay?

A. I got my pay right then. That's when they paid off.

Q. Didn't they pay your wages until you got back to the Pacific Coast, back to Portland?

A. Yes, sir, they gave me my transportation and wages back to——

Q. And wages?

A. And wages back to the Pacific Coast.

Q. So, how much wages after the 15th of December did you receive for how many days?

A. It runs around \$125 they give you now. That's what it is, about \$125 transportation money [195] that they give you from Galveston to Portland, Oregon, where I signed on the ship.

Q. What wages? How much for wages?

A. Well, that all—that all includes in your transportation. They make a—they make a regular bonus of it. They say, "Well, transportation and wages \$125 back to Portland, Oregon" when you pay off with the Commissioner.

Q. All right. Well, then, it was somewhat more than eleven months that you got paid for?

A. No. It was just exactly eleven months that I got paid.

Q. Well, all right. Did you work continuously twelve months each year, Mr. Farley?

A. Well, I worked twelve months on some ships. I have stayed on some ships as high as eighteen and nineteen months.

(Testimony of John Farley.)

Q. Continuously?

A. On a ship, yes. I was first assistant on the Francis W. Parker, you will see in there, for nineteen months straight during the war.

Q. You were a first assistant then?

A. I was first assistant engineer. I took her out of here as first assistant and I got off in San Francisco when they got a man to relieve me there and come back home.

Q. Did you have a temporary license as first assistant?

A. They just — the steamboat inspectors came down aboard it right here in Portland, Oregon, [196] and they said it's all right to let Mr. Farley sail as first assistant because he has been going to sea quite awhile. And I went out as first assistant.

Q. Well, generally, have you worked all twelve months each year, Mr. Farley?

A. Not all twelve months in every year, no. I have worked ten months, eleven months.

Q. On the average, ten to eleven months would be about the right amount that you worked each year?

A. Well, in 1950 I didn't work at all except a few night watches here in Portland, Oregon. I stayed home and built myself a home.

Q. Yes?

A. And that's the only time that I was off the ship for any length of time like that. It shows right in my book.

Q. That's the only time you were off for a

(Testimony of John Farley.)

whole year. But, what I was asking you is whether on the average ten to eleven months was about as much as you worked each year?

A. Well, that's—you could say that. On some ships I have stayed on for quite awhile, you know, fifteen months, two years. I have stayed on ships two years.

Q. Yes. Well, you have mentioned it yourself that generally you worked ten to eleven months a year?

A. I worked till the ship ties off. I don't get off the ship, I stay with the ship. And, when the ship [197] ties up then I have to get off and come home. That's how I come off a lot of ships and come home.

Q. All right. But, what we are trying to get at is how much of the year on the average did you work?

A. I'd say about ten, eleven months. Ten months. Put it ten months a year and following it right on through it will come out all right like that. I know I worked that much, anyway.

Q. All right. What do you weigh today, Mr. Farley? What is your weight now?

A. About 192 pounds.

Q. What was your weight at the time of the accident?

A. I suppose about 190 pounds then. I don't remember. I couldn't say for sure because I don't know.

Q. You don't know what your weight was then?

(Testimony of John Farley.)

A. No, sir. I quit smoking and I started putting on some weight, I know that much.

Q. You had quite a serious illness about ten years ago, too, didn't you, Mr. Farley?

A. Ten years ago. What would that be?

Q. Did you have a serious illness about ten years ago? A. No, sir; not that I know.

Q. Well, did your weight go down to about 150 pounds? A. Oh! that.

Q. At one time? [198]

A. Yes, sir. I didn't—I was out. My weight went down, that's right. I come in on a ship and I looked like—that was in '45. I come in on a ship and if you was out where I was at and under bombs and ships going up all around you you'd lose weight too. I was first assistant on a ship and I stayed on it nineteen months and that's where I lost my weight on that ship. I looked like a skeleton. I come in, I lost the weight aboard that ship.

Q. But, you had not been ill?

A. No, sir, I wasn't in no hospital or nothing.

Q. Well, you weren't in any hospital, I know. But, the question was whether this loss in weight at that time was due to any illness or not?

A. No, I wouldn't say.

Q. Had you been sick at all?

A. No, sir; I wasn't sick.

Q. Have you at any time suffered from rheumatism?

A. I had rheumatism in my knees and I used to go up and down the ladders. When I come in on



(Testimony of John Farley.)

that trip that's when it started in in '47. I went and got some shots, Sherwood treatments and he told me if I would take Sherwood treatment if I would get three or four shots and if it would do me any good let him know. So, he give me three or four shots and I told him, "Yeah, I think it's doing my knee some good." And I took ten shots [199] and that was all I taken and I was supposed to take twelve shots and I shipped out to sea and I was gone to sea and my knees have never given me a bit of trouble since that date.

Q. Was that a doctor here in Portland that gave you the treatment for this knee trouble?

A. Yes, sir. He gave me——

Q. Who was the doctor?

A. I couldn't tell you because I don't know. They change—you know, change so often up there. I don't know who the doctor was.

Q. It was a Public Health——

A. Public Health doctor.

Q. Oh. It was a Public Health physician?

A. Yes, sir.

Q. In addition to that, any other illnesses or operations that you have had, is there anything else?

A. I have had an operation when I was working up in St. Vincent's Hospital as an operating engineer.

Q. In what year was that?

A. Maybe '40 or '41, I couldn't say now for sure what it was.

(Testimony of John Farley.)

Q. Before the last World War? Was it before the last war?

A. It was right after—right after the war. I think it was in '41, I guess. The war was on then, I think. I quit the—I quit the Charles Christensen and I came in here and went to work, stationary [200] work, for about a year and a half and then I went out to sea again. But, that's when I—I had this hernia operation. I was working with the chief engineer up in the power plant and we was fixing the air ducts up there and we was cutting a plate. So, when he cut the plate off that you lay down so the air won't get in and shut the air off on the air duct, he cut the plate and it kind of fell down and when it did I reached like that (demonstrating) and I grabbed it and I held it up and then I went outside. As I was the operating engineer on there—and I went outside and I look up at the stack to see if it was smoking which you do because they don't want no smoke in around Portland and they tell you always to watch your stack and see if it was smoking. So, I did that and when I did look at the stack this thing popped out on me right then and I put my hand down and I felt and it was a big egg stuck down below where I had this hernia operation. And I come in the power plant and they took me up to the hospital and then this Dr. Gambee, he operated on me and three or four days later he operated on me and I was—that's what happened to me there. That's the only operation I ever had.

(Testimony of John Farley.)

Q. That's the only operation you have had?

A. Yes, sir.

Q. I thought you said that happened when you sneezed?

A. That's what I told you. I went outside and [201] I looked up at the stack and when I sneezed that's when it popped it right out there.

Q. Well, then, when you looked at the stack you did sneeze?

A. Yes, sir. I looked up at the stack and I sneezed—the sun. I was on day watch there when it happened.

Q. Now, Mr. Farley, are you married or single?

A. I am married.

Q. Any children? Are you living with your wife?

A. Yes, sir.

Q. Any children?

A. She has got one boy in San Francisco.

Q. But none that are staying with you?

A. None of mine.

Q. You live on a place about how big?

A. I got three acres.

Q. How many houses on that?

A. I got five duplexes and my own home and then three or four shacks around there.

Q. That you rent out?

A. Well, I got the duplexes.

Q. You rent the duplexes out. What about the shacks, are they rented too?

A. No, sir, they're just for the——

Q. They're not houses?

(Testimony of John Farley.)

A. They're—no houses there, just shacks, little [202] chicken house and just an old—just old buildings you put stuff in and store stuff away in them.

Q. You have your own home there and you have five duplexes?      A. Yes, sir.

Q. That's ten different quarters to be rented?

A. Yes, sir.

Q. Is that used as a sort of a motor court?

A. No, sir. It's rented by the month.

Q. You rent it by the month?      A. Yes, sir.

Q. You don't hold out as a motor court or a motel?      A. No, sir.

Q. You have your chickens, do you?

A. Yeah. I have 35 or 40 chickens.

Q. Thirty-five or forty chickens. And you look after them, do you?      A. Sir?

Q. Do you look after them?

A. Yes. I carry water to them and feed them and——

Q. You don't have the water tap running right there in the chicken yard or chicken house?

A. No, sir.

Q. So, you carry the water?

A. I carry the water in a bucket to them.

Q. And you clean the chicken house out, don't you? [203]

A. Yeah. When I clean it out I clean it out in a wheelbarrow.

Q. Well, it has to be cleaned out periodically, once a week?      A. Yes; once a week.



(Testimony of John Farley.)

Q. What do you use, what sort of litter, sawdust?      A. Straw.

Q. Straw?      A. Straw.

Q. When you clean it out do you use a pitchfork to shovel it out through a window?

A. I just scrape it off with a shovel. I just scrape it off the roosts and then into the wheelbarrow and then wheel the wheelbarrow out and dump the wheelbarrow out in a place where—let it mulch.

Q. The wheelbarrow—you throw it onto the wheelbarrow and wheel it out of the chicken house?

A. Yes.

Q. Now, then, you put it on a sort of a pile and after it's rotted you put it onto your garden, I suppose?

A. Well, I don't get so darn much of it from 25 or 30 chickens, I will tell you that. That's what my wife does right——

Q. Didn't you say a moment ago 35 or 40 chickens?      A. Yes, sir.

Q. Now, it's 25 or 30? [204]

A. No, I didn't say that.

Q. How many did you say?

A. I said I have about 25 or 30 chickens.

Q. Twenty-five or thirty?

A. Yes. That's right.

Q. That's about the proper number, is it?

A. Yes, sir.

Q. Now, you put this out on a pile where it was to mulch, isn't that the word you used?

(Testimony of John Farley.)

A. Yes, sir.

Q. What do you do with the mulch afterwards?

A. My wife takes it and puts it around her flowers around there.

Q. Your wife puts it in the wheelbarrow?

A. Yes, sir. She takes and puts it around the flowers.

Q. Hauls it around the garden?

A. Yes, sir.

Q. Do you have a vegetable garden too?

A. No, sir.

Q. No vegetables?

A. Well, I got no vegetable garden there.

Q. How much of an area is this lawn or grass in? How big is your lawn that you have to mow?

A. I'd say just the regular place, I'd say a good half acre in there. [205]

Q. Is in grass?            A. Is in grass.

Q. What kind of a mower is it you use to mow with?            A. It's a power mower.

Q. You start the engine all right, do you?

A. Yes.

Q. Is it one of these little Briggs-Stratton engines?            A. That's what it is.

Q. Then you run that over about a half an acre?            A. No, sir.

Q. What do you do?

A. I take and run it. I run it for about an hour and then I quit.

Q. Oh?

A. And then the next day maybe I will do

(Testimony of John Farley.)

some more, and the next day I will do some more, and keep that up until I go over it. I don't go over the whole place. I never would get to keep going over it and over it. I go over it as much as I can.

Q. Well, you don't try to mow the whole half acre in one day?      A. No, sir.

Q. So, you work for about an hour?

A. That's right.

Q. In mowing? And then you probably knock off for that day? [206]

A. I take and knock off or I go in for therapy right then in the morning. I may mow for an hour and go in and take my bath and lay in the bath tub for awhile and then I go in and get my therapy and then I come back home and maybe I will start the mower up again and mow for maybe a half hour or something like that. And I lay there and I put—I got a heat lamp there and I put that on me at nighttime and my wife massages my back also besides that.

Q. Now, you tell us what you do on a typical day where you don't come in to have your physiotherapy. What time do you get up in the morning?

A. Well, I get up about nine o'clock, eight-thirty.

Q. Do you get your own breakfast or does your wife get it?

A. No, sir; my wife gets the breakfast.

Q. What do you do after that?

A. Well, I go outside and throw some mash out

(Testimony of John Farley.)

for the chickens, put it in a trough, and then I will take a little bucket of water or one of them ten-quart buckets of water, bring it out there and dump it in the mash so the chickens can eat it. And then I come in the house then and eat my breakfast and maybe I will go on out and maybe run the mower or either that or I will go out and clean around something or go in the nut house, crack nuts, just like that. I got about eighty pounds of nuts out there that I must crack. [207] I just set there with a hammer and just crack them and put them in a bucket. And I still got them out there.

Q. Those are filberts, are they not?

A. Walnuts.

Q. Oh. Walnuts. Are those walnut trees in your place?      A. Yes, sir.

Q. Do you have the walnut trees on your own place?      A. Yes, sir.

Q. Who picked the walnuts last fall?

A. I took and raked some of them up and picked them up myself too.

Q. Well, do you wait until they fall off of the tree before you harvest them?      A. Yes, sir.

Q. You wait until they fall off?

A. Yes, sir.

Q. Then you rake them together and pick them up off the ground?      A. Yes, sir.

Q. Were you able to carry a sack of eighty pounds of nuts all right?      A. No, sir. No, sir.

Q. What did you do?



(Testimony of John Farley.)

A. Well, I just take and—the nuts and put them in a water bucket, pick them up in a water [208] bucket. I rake them up and—you couldn't get only about fifteen or twenty pounds of nuts. It would be a lot of nuts. And I bring them in and bring them into the nut house and my wife takes and has them in there and she dries them and then she stacks them up and I take them and crack the nuts for to sell. That's what I do.

Q. You sell the——

A. And the same way with the filbert nuts, I will rake them in a pile. Just last year I took and raked the filbert nuts in piles and got some sacks with burlap in them and I just raked them up in little piles and then I kind of laid down and picked the nuts out of the piles and put them in the bucket and then I got up and carried the bucket. I may pick about thirty pounds of walnuts or filberts in a day like that.

Q. How much of your three acres is in walnuts and filberts?      A. Fourteen trees.

Q. Fourteen. That is walnuts and filberts?

A. No, sir. Fourteen trees of walnuts.

Q. Oh, yes. And how many filbert trees?

A. There is pretty near an acre of filberts.

Q. Pretty nearly an acre of them?

A. Yes.

Q. Do you sell the nut meat, do you, after you crack them?      A. Yes, sir. [209]

Q. You sell the meat?

(Testimony of John Farley.)

A. My wife sells them to the bakers or somebody that happens to buy them. She sells them.

Q. Yes. Well, now, let's go on with your day there when you are not coming in for your treatment. In the morning you said you would go into the nut house perhaps and shell a few nuts setting down there. What did you do after that?

A. Very little work I do around there, I will tell you that, very little work I do.

Q. Well, just tell us what you do, Mr. Farley, and then we can tell whether it is very little.

A. Well, I just take and I lay down around in the house. I don't do very much work around there.

Q. Well, here we had gotten to about noon-time, I think, and you cracked some nuts and then about noon you go in and have your lunch, I suppose?

A. Well, I won't maybe eat until maybe two or three o'clock in the afternoon. The wife may get dinner.

Q. Two or three o'clock?

A. But, I will be maybe laying around in the house or—I don't—I don't do very much out there, I will tell you that.

Q. Yes. Now, in addition to the work that has to be done with the lawn mower, do you have to cut some grass with a sickle or scythe? [210]

A. Yes, sir.

Q. Well, do you do that work with the scythe and the sickle?

A. No, sir.

(Testimony of John Farley.)

Q. Who does it?

A. The wife will take and she takes the scythe and cuts some of that grass down.

Q. You let your wife handle the scythe?

A. Yes, sir.

Q. And——

A. She done it yesterday. I think she got — she——

Q. Yes. Now, who keeps these ten places besides your own home in shipshape, I mean, when something has to be done around them?

A. My wife paints them and cleans them up and takes care of them. She does the work over there.

Q. Your wife paints them and cleans them up when tenants move out?

A. She does the cleaning.

Q. You don't help on that at all?

A. Very seldom I ever help over there.

Q. Just what would be wrong with your standing up against the side of one of these houses and brushing some paint onto them? How would that hurt you?

A. They need painting right now, that's what [211] they need. I couldn't do that.

Q. You haven't even tried it, though, have you?

A. I stand up and help her dry dishes and I can't stand it.

Q. You stand up and help her dry dishes?

A. Yes, sir.

Q. How long do you stand there drying the dishes?

(Testimony of John Farley.)

A. Maybe three quarters of an hour and my back will hurt.

Q. Three quarters of an hour? A. Yes.

Q. When just you and your wife have been eating there you have three quarters of an hour's worth of work?

A. Not just the eating, she is liable to have a pile of dishes on the sink or drainboard, or stuff like that, and she will get in there and wash them and I may give her a hand.

Q. Yes. Still you can go to the physiotherapy place down here and exercise there for three hours and standing up and wiping dishes after three quarters of an hour makes your back hurt, is that right?

A. When I go to physiotherapy I go in there and I lay under heat treatment.

Q. All right.

A. I lay down and take heat treatments on my back. I take that for—from one o'clock until two o'clock.

Q. All right. [212]

A. And then from two o'clock I go on and I take exercises lifting weights and then I go in and I stand on a board, or whatever he wants me to do, with my back trying to strengthen my back. I just take——

Q. You start in at two o'clock and for how long do you continue to do things on your feet while you're on your feet there?

A. I am, oh, there until three-thirty.

Q. Till three-thirty? A. Yes, sir.



(Testimony of John Farley.)

Q. Well, after you have been on your feet from two to three-thirty doing the exercises does your back hurt?      A. Yes, sir.

Q. It does?      A. Yes, sir.

Q. What do you do for it then?

A. All I do is just get in my car and go on home and that's—and wait and come on in again.

Q. Then you drive home and sometimes you go and mow some lawn then after that then, don't you?

A. I don't mow the lawn right then. I take and go on home and maybe I will in the evening I may take and tell her, I says, "I will go on out and mow a little grass." And she says, "All right, John."

Q. Yes. Now, Mr. Farley, have you now told us about all [213] the work that you do and all the exercising that you do?      A. Yes, sir.

Q. That's about all of it?      A. Yes, sir.

Q. The only time you attempted any job for which you got paid was in September, 1953?

A. Yes, sir.

Q. You have let nearly two years go by since then without trying to work another job, haven't you?

A. I been up there at therapy for the last year.

Q. Well—

A. I can't—I couldn't take and do the job, I know it my own self that I can't do the heavy work.

Q. But, you haven't tried any? You haven't tried?      A. I know I can't do it.

Q. Yes. You didn't go down to take a night engi-

(Testimony of John Farley.)

neer's job on one of these ships to see how you could get through on it?

A. Ray Robinson told me if I can't do the work and open boilers and pulling wrenches and stuff that there is no use trying to get somebody else do your work.

Q. Well, are you telling us that a man that goes down there on the night relief has to pull boilers?

A. Whatever the chief engineer tells him to do you do it.

Q. That repair work is being done on the ship at nighttime [214] when she is in port here by the engineer officers?

A. You are taking water and everything else like that.

Q. Well, now, taking water is quite a different thing again. We were talking about pulling boilers.

A. If they ask you to open up them manhole plates you're going to have a boiler inspection or something they will ask you to do it and you will do it.

Q. As a relief engineer you have never done it, though, have you? As a night engineer have you ever done that kind of work?

A. Yeah, I have done that work.

Q. As a night engineer relieving for just a night?

A. No, I didn't take and do that.

Q. No.

A. No. But, I have worked on board keeping up an engine and stuff.

Q. Now, except for minor adjustments there are

(Testimony of John Farley.)

no—the engineers don't do any repair work on the ships, do they?

A. You mean the engineer aboard?

Q. Aboard. A. Yes, sir.

Q. While the vessel is in port in Portland?

A. Yes, sir.

Q. What sort of repair work do they do?

A. Put in rings. [215]

Q. Into what?

A. Into pistons or in the valve stems.

Q. On steam vessels?

A. Yes, sir. Reciprocating-engine jobs.

Q. You have done that, have you?

A. Right. From the Trans-Oceanic right on the ship down there I have put in—put in stuff while I was on night watches.

Q. Who makes the major repairs on the ships' engines, is that done by shore crews or not?

A. Sometimes it's done by shore crews and sometimes it's done by the crew aboard a ship. It depends on how big the job is.

Q. Yes. Now, you put in the night in September, 1952, on that relief job, though, didn't you?

A. Yes, sir.

Mr. Williams: I believe counsel means '53.

Mr. Krause: Yes.

Q. September, 1953? A. Yes, sir.

Q. You put in the night? A. Yes, sir.

Q. How many hours?

A. I put in eight hours down there. I laid down, though. I couldn't take it. [216]

(Testimony of John Farley.)

Q. During those eight hours you laid down?

A. Yes, sir.

Q. And you didn't go back the following night?

A. No, sir. The ship sailed next morning.

Q. So, that job ended then?

A. That job ended.

Q. Now, actually, you did apply to Ray Robinson for his sending you down onto another job, didn't you?

A. I wanted to get to work again and I told him what happened and he said if I can't do the work, John, there is no use going down there.

Q. But, you did tell Robinson you wanted to be sent out again? A. Yeah, I did.

Q. And you haven't improved sufficiently since that date so that you even wanted to try another job?

A. I would like to try the job but I just—I know I can't do the work.

Q. Yes. Well, you know you can't do the work without trying?

A. Yeah, I know that. I'd like to do it. That's what I am taking therapy—I thought I'd get my back in shape that I could go, could be able to go back on ships. I don't like this laying on shore here. I like to go to sea.

Q. Well, Mr. Farley, you did manage to [217] get through the night in 1953 on this job and you made some improvement since then, haven't you?

A. On my arm, yes, sir.

Q. On your back too?



(Testimony of John Farley.)

A. Well, I don't know. My back still hurts me, I don't know. My arm——

Q. Your back still hurts you?

A. Yes, sir. My back still hurts me.

Q. It hasn't improved any?

A. I don't know. I don't know. It just hurts me just the same. I don't know.

Q. So, at any rate, there has certainly not been enough improvement in order to get you to go and try another job anyway. You haven't improved that much that you wanted to try another job?

A. I would like to try another job if you would give it to me.

Q. Well, have you asked him for a job?

A. I asked Ray Robinson when he called me up that time and he told me about it and he says, "John," he says, "can't send you down there if you can't do the work."

Q. Well, that was in September, 1952?

A. Yes. That's right.

Q. '53?           A. '53. [218]

Q. Pardon me again. '53. Now, nearly two years have gone by but you didn't ask Mr. Robinson to send you out on another job?

A. No, sir. I been taking therapy, see, and if I can get well that's what I can—can't——

Q. Now, Mr. Farley, the Augustin Daly arrived in Sasebo about April 2, 1952, didn't she?

A. Yes, sir.

Q. Then the first time you went ashore was on the night of the 5th?           A. That's right.

(Testimony of John Farley.)

Q. 5th of April. And you said you went ashore right after supper about six o'clock?

A. That's right. Or five o'clock, I guess, when they have supper. I went ashore right after—right after chow, anyway.

Q. Yes. And, did you go ashore alone or with somebody?

A. I went ashore with Morgan.

Q. With Morgan. He was an oiler, was he?

A. He was an oiler.

Q. Oiler. It's customary for the licensed officers to go ashore with the men that way, isn't it?

A. There is no law stopping it. You can go ashore with them.

Q. Well, I say, it's customary?

A. Well—— [219]

Q. Then you and he when you got ashore went and had a drink together?

A. Yes, sir.

Q. Now, did you have this first drink before you had your haircut or afterwards?

A. I think I had my first drink right when I stopped at that little bar and then we left and I went in to get my haircut and then he went across the street and I went over there and met him and had a drink over there with him. When I went over there I had a drink with him and that's—and then we left and went uptown.

Q. Now, this first one was in this bar right on the dock or near the dock, was it?

A. That's right.

Q. What did you drink in there?

A. A beer.

(Testimony of John Farley.)

Q. What kind of beer?           A. Just——

Q. American or——

A. Just that Japanese Ashai beer.

Q. Japanese beer?

A. Yeah, that's right.

Q. Was it a quart bottle or what size bottle?

A. It was a quart bottle. It was poured in between both of us, that's right. [220]

Q. That is, you shared a quart bottle?

A. Yes, sir. That's right.

Q. The second time what did you have to drink after your haircut?           A. I had a beer too.

Q. Well——           A. Same way.

Q. ——did you drink the whole quart yourself that time?

A. I don't know. I guess I had a bottle of beer all right. They're not——they're just the fifths. I set there. Yes, I guess so. Yes.

Q. A fifth of beer?           A. Yes, that's right.

Q. So, what time was it then approximately?

A. I'd say, oh, it could have been around seven, seven-thirty, or something like that.

Q. Then you went uptown to see the Cherry Blossom Festival?           A. That's right.

Q. When did you start back to the dock again then?

A. About eleven o'clock we started back to the ship. We walked back, we didn't take a cab or ricksha or anything, we just walked back and when we got back to this one spot where Morgan wanted to go to, why, I wouldn't go in there because he wanted

(Testimony of John Farley.)

just to go in and see that Jap gal so I said, "Well, I will see you down at that other place because I'm going [221] to buy some other stuff." So he stayed in that other place. And about a quarter to twelve he must have been—he left that other place. I suppose that's about the time. It only took about two minutes to walk over there and I went around the corner and bought a couple of kimonos and came back in this barroom where these fellows were in there and I got my stuff and I says, "Well," I says, "about time for the launch," and I gathered up my stuff and I went out of there. And maybe somebody's liable to say "Here, take this," and hand you a glass of beer, or something like that, that they had poured out and maybe I took the glass from the guy and took a little bit of it.

Q. Yes. So that is besides these other two drinks that you had, just before you left to go out to the launch you had another one?

A. I wouldn't doubt. Maybe I did.

Q. Well, was that whisky or beer again?

A. Beer.

Q. Yes. And, by the way, when you first came ashore and in this little tavern on the dock you saw these colored boys from the steward's department drinking there at the time, too, didn't you?

A. They weren't in there.

Q. This man that later on fell on you?

A. They were in there when I came back [222] at eleven o'clock that night, that's where they were at.



(Testimony of John Farley.)

Q. Oh. At eleven o'clock you saw them in there?

A. Yes, sir.

Q. They were drinking then, weren't they?

A. They were settin' over on the table over there.

I guess that's what they were in there. They was drinking and fooling around with the Jap women.

Q. What were they drinking, do you know?

A. I don't know.

Q. Yes. So, then, it was about midnight when you got down to the landing, I suppose?

A. Yes, sir.

Q. Was the launch there when you got down to the landing?

A. Yes, sir.

Q. You got right aboard?

A. Yes, sir, I come right aboard and walked over and got on the launch.

Q. When you finally left the dock there you had somewhere around twelve or fifteen men on the launch?

A. That's right.

Q. You said that there were only eight or ten in the launch when you went ashore?

A. Well, the men go ashore and—the men go ashore at different hours and some of them don't come back until the last launch. Some of the fellows go ashore at twelve o'clock [223] and they don't come back until the last launch.

Q. So, that—

A. They're filled all up. The fellows go ashore during the day, why, some of them picks up other launches, waves at other launches going by the ship and they come on over and pick them up and they

(Testimony of John Farley.)

will go ashore. And then when the ship—when the motorboat leaves there—otherwise it would cost you quite a bit of money to get back to the ship if you pay it out of your own pocket when that launch goes.

Q. So, you take the free launch provided by the ship?      A. That's right.

Q. All right. Now, when you got there to the Augustin Daly about where did the launch put up against the side of the ship?

A. Pulled up midship.

Q. Right about in the way of the bridge and the midships house?

A. Just where they had the ladders at.

Q. Well, I know. But that was where the midships house is located——      A. Yes.

Q. ——wasn't it? Was the ladder, do you recall where it was with respect to that midships house? Was it forward or aft or about in the middle?

A. It was aft of the midships house. [224]

Q. Toward the after end of the midship house?

A. Yes, sir.

Q. And did you see what sort of cargo work was being carried on as you came alongside the ship?

A. I didn't see no cargo being worked at all when I pulled alongside.

Q. You didn't see whether there was work still going on the ship?      A. No, sir.

Q. Were the cargo lights burning on the ship?

A. They had the lights.

Q. At the time you came alongside?

(Testimony of John Farley.)

A. They had the lights up on the ship because when I come back in the motorboat and it went on up and circled around I took a look over and I said, "Well, there she is" and that's what I said there. Harry Morgan—we was sittin' there, I said, "Well, there she is."

Q. Well, are you not telling me that you saw the cargo lights or you didn't see them?

A. I saw lights that they had, mast lights and everything on the ship.

Q. Well——

A. They had the lights burning.

Q. You do know what cargo lights are?

A. Yes, I do. [225]

Q. Were those burning or weren't they burning?

A. I couldn't say.

Q. You don't know. Now, what lights did you see about the ladder, the Jacob's ladder?

A. Well, I will tell you, when I come aboard they have a light up above and you take it for granted that just the light is right there at the housing of the boat up above. You can see just the light shining out from the cluster light.

Q. That is at the corner of the boat deck?

A. On the corner of the boat deck up above.

Q. Above the ladder?

A. And they have underneath there at the time, I think, too they had them tied down both ways.

Q. Two ways, one forward——

A. I know one light was there right up above, I know that for sure.

(Testimony of John Farley.)

Q. You know that there was one cluster light there?

A. Yeah. There was one light up above.

Q. Can you tell us how many globes there were in that cluster light?

A. No, I could not. They have about five or six globes but then I don't know if they had that Mogul. They have a Mogul light too.

Q. A great big globe?

A. A great big light too. [226]

Q. I thought that you had said yesterday that there was about seven or eight hundred watts of light at the ladder. Did you?

A. No, sir, I never said that.

Q. You don't know whether they had a big globe in that cluster or whether there were four or five small ones, is that right?

A. No, sir.

Q. You had gone down this pilot ladder when you left for shore, had you not?

A. Yes, sir.

Q. When you came back you saw that the pilot ladder was still there in the same place?

A. I presume it was.

Q. Well, what did you see?

A. Men had to go aboard. I didn't—I didn't—like I told you, I was just sitting down back there when the boat pulled up alongside. I just got up and says, "Well, let's get going," and I walked on up toward the midships house and was going to get ready to get aboard when my turn come. I was in no hurry to get aboard. And I just stood there and



(Testimony of John Farley.)

when this man fell on me that's how quick it was done.

Q. Well, now, when you walked along the launch—— A. Yes.

Q. ——did you walk in the direction of the Jacob's ladder? [227] A. Yes, sir.

Q. Because you knew that you were going to climb a ladder, didn't you?

A. I walked in the direction coming up towards the Jacob's ladder. The Jacob's ladder was on the side. Here is the Jacob's ladder here (witness demonstrates) and I am over here (indicating), I just walk up alongside and there is a space in between the launch that wide (indicating).

Q. Yes?

A. And you just walk up by that house. You know, that deck is covered over there.

Q. All right. You were in the stern sitting on this hatch—— A. Yes.

Q. ——when you got there? A. Yes, sir.

Q. And that hatch was how many feet from the place where the ladder was hanging down?

A. Oh, I should judge maybe ten feet.

Q. Ten feet? A. Ten feet.

Q. So, you walked along the side of the vessel of this launch? A. Yes, sir.

Q. Did you walk between the launch and the Augustin?

A. Yes, that's right. I walked between the launch and the Augustin Daly. [228]

(Testimony of John Farley.)

Q. All right. And you walked up there toward the ladder?      A. Yes, sir.

Q. Then you stopped up there at some point near the foot of the ladder?

A. No, sir. I walked up there and stood at the foot of that little house that's on the little boat. I was right opposite of the little house there and I stood there talking to Mr. Morgan when this all happened. This all happened right that quick (witness snaps fingers), that's all.

Q. How close to the foot of the ladder were you standing?

A. I was about five feet away from the side of the ship.

Q. From the side of the ship?      A. Yes, sir.

Q. That still doesn't tell us how close you were to the foot of the ladder.

A. I don't know how far I was. I know the ladder—I know the ladder was in that vicinity where I was standing, close in there, anyway, because the men were getting aboard the ship.

Q. Well, now, yesterday didn't you tell us that you were standing five feet from the foot of the ladder?

A. I was standing five feet from the side of the ship and the side of the ship is maybe where the ladder is.

Q. Well, is that the same thing then that you were standing five feet from the foot of the ladder?

A. I would still contend maybe that would be right if you want to put it that way.

(Testimony of John Farley.)

Q. Five feet from the foot of the ladder?

A. Yes, sir.

Q. When your deposition was taken do you remember what your best estimate was at that time?

A. No, I don't.

Q. Was it four feet from the foot of the ladder?

A. I don't know. Four or five feet, I'd say.

Q. Yes. Well, that's what I'm getting at, see. If it's not five feet that you were from the foot of the ladder it would be less than that rather than more, wouldn't it, because it would be four or five feet in your best estimate? A. That would be right.

Q. Yes. Now, Mr. Farley, did you have your packages under your arms at that time?

A. Yes, sir.

Q. Were you going to climb this pilot's ladder carrying your packages? A. Yes, sir.

Q. You were not going to send them up on a heaving line? A. No, sir.

Q. Well, then, going up a pilot's ladder carrying anything is, in your view, not a dangerous thing is it?

A. It's dangerous all right. [230]

Q. Well, you were going to do it yourself?

A. I was. Yes, I would have done it. I would have tried it, anyway. I would have went up or tried it.

Q. Yes. A. And so——

Q. They have them tied up. They have them tied up with this stuff that they have over there like bamboo, you know. They make your packages fast

(Testimony of John Farley.)

and they put a little handle on it and you throw it over your arm and you have your arm and the package hanging down on your arm and then go up the ladder that way (witness demonstrates).

Q. Did you have more than one package, Mr. Farley?

A. I had two or three packages. I had a doll and some kimonos and stuff.

Q. Were they all done up that way so you could hang them over your arm? A. Yes.

Q. They were all done up that way so you could strip them down on your arm?

A. I had gotten them up that way. They had that bamboo stuff on them, I know that.

Q. Well, now, Mr. Farley, what do you tell us now as to whether or not it's dangerous to go up the ladder when either of your hands are encumbered? I mean, when you don't have both hands free? [231]

A. I don't know. I don't get what you mean.

Q. Well, let me withdraw that question. You said a moment earlier that it was dangerous to carry packages going up the ladder, didn't you?

A. I said it was dangerous.

Q. Didn't you say it was dangerous to carry packages when you are climbing a pilot's ladder?

A. Well, it's hard to climb a Jacob's ladder with packages, I will tell you that, yes. If you had a big package it would be dangerous.

Q. Well, with the packages that you had was that dangerous to climb it that way?



(Testimony of John Farley.)

A. I never give it any thought.

Q. You never gave it a thought. Now, you did not look to see how any of the other men were climbing the Jacob's ladder, did you?

A. No, sir.

Q. When you got there you stood in the place that you have told us without looking to see whether anybody was going up the ladder and in what shape he was going up?

A. That's right, I didn't. I didn't pay any attention to who was going up the ladder or who fell, I don't know.

Q. Now, is it regarded as a dangerous place to stand at the foot of a ladder while other men are going up the ladder?

A. Well, you have got to stay on the launch some place [232] when you are up there amidships and there is maybe ten or fifteen—or ten men or eight men or seven men around there, you have got to stand some place close there.

Q. Mr. Farley, you told us that you walked about ten feet from the stern of the vessel to get to that point, didn't you?

A. I did.

Q. Was there anything to have prevented you from staying there where you had been sitting till the rest of the men had gone up?

A. No, there would have been nothing to stop me but, then, I didn't think it was that dangerous.

Q. Well, all right. What I wanted to know, is it regarded as a dangerous place to stand at the foot

(Testimony of John Farley.)

of a pilot's ladder under the circumstances that you have described to us?

A. Five feet away from there, I don't think it—I don't know where else I could stand.

Q. Well, you could have stood ten feet farther back on the ship if you had wanted to?

A. I was getting—I was coming up to go aboard of the ship. I just walked up. I never give it any thought at all. I just walked on up there. I never saw a man fall off a ladder before in my life. Never figured on anybody falling off.

Q. All right. Now, Mr. Farley, I will ask you now, do you [233] know now, consider that a dangerous place to stand under the circumstances that you had there that night?

A. Well, in that way, yes, I would look out the next time if I was ever aboard a ship.

Q. The next time you wouldn't do it?

A. The next time I'd stay clear. I'd try to wait till the last one. I'd stay back in the back.

Q. Well, now, you weren't interested in how these other men were climbing the ladder at all ahead of you, were you?

A. No, sir. I just—they got up the ladder.

Q. You weren't concerned about whether they were sober, whether they were trying to carry some packages up with them, whether they were traveling on that ladder in a careful fashion, you weren't interested in that, were you?

A. I wasn't interested in how they got up or——

Q. No. Had any——

(Testimony of John Farley.)

A. If they went up I suppose they would get down.

Q. Had you observed that any of the men had been drinking more than they perhaps should have?

A. No, sir, I did not.

Q. That is, the way they acted in the boat going over there, none of them appeared to be intoxicated?

A. I didn't—I will tell you, I didn't pay any attention to them in the boat at all because they were up forward and I was aft. I don't mingle with them guys, anyway. I stay [234] with the black gang. That was with Morgan and he is in the black gang. I don't stay with the niggers.

Q. That wasn't the answer to my question. I asked you whether you noticed any of the men were intoxicated?

A. No, sir, I did not.

Q. You did not. A. No.

Q. Did you notice that any of the men were carrying packages?

A. I never even noticed that.

Q. All you did notice was that you had some packages?

A. I had packages.

Q. Well, you knew that Morgan had been buying stuff along with you?

A. Yes.

Q. So, therefore, he must have had some packages?

A. He had packages. He had packages with him.

Q. Yes. A. That's right, he had packages.

Q. You hadn't seen any of the other fellows buying any stuff or carrying any packages?

(Testimony of John Farley.)

A. No, sir.

Q. Was there any noise there at the time of the ship's winches operating as you just arrived alongside of the ship?

A. I never heard any winches. [235]

Q. You didn't hear it. As far as you can recall it was all quiet?

A. I thought the cargo was off the ship, that's what I thought.

Q. You thought the cargo had been completed?

A. Yes.

Q. At any rate, you don't recall any noise at all——

A. No, sir.

Q. ——that would have prevented your hearing?

A. My hearing is good but I didn't hear any noise.

Q. You didn't hear someone yell a warning that a man was falling off of the ladder?

A. No, sir. I suppose by the time that noise of that hollering got to me I was knocked down. I suppose that's how quick it would happen. I never heard it.

Q. Do you recall whether there was anybody between you and the ladder at the time that you got knocked down?

A. Morgan was right ahead of me right standing this way (witness demonstrates) right from me. I was standing this way (witness demonstrates) just like I was standing—just like I am *not* and Morgan was standing here (indicating) and here



(Testimony of John Farley.)

(indicating) is the passageway to the launch. He was standing right close to the passageway closer than I was to the ladder.

Q. Well, he was standing closer to the ship, anyway?

A. He was standing closer to the ship, yes, sir. [236]

Q. Then, the distance from him to the ladder would be less than from the ladder to you?

A. Yes, sir.

Q. Where was Pattox standing?

A. I don't know. Pattox must have been behind or some place. I don't know where Pattox actually was. He must have been behind me or something like that. I don't know. I couldn't say.

Q. You had been under the treatment of Dr. Kimberley in connection with the Public Health Service, hadn't you, Mr. Farley?

A. I will tell you, when I was up to the Public Health Service they sent me over to Dr. Kimberley to be examined and when I got over there he examined my back and I brought the X-ray pictures over to him and I never know what they say, I will tell you that. They send a letter back to the U. S. Public Health Service and then later on the company called me up again and asked me to come in and go before Dr. Kimberley again to be re-examined. So, I went over and he taken some X-ray pictures of me but he recommended that I have a brace and then—but I never got the brace. I had a

(Testimony of John Farley.)

brace but I never received any brace but Dr. Kimberley recommended a brace for my back.

Q. A different kind of brace than you already had?

A. Yes, sir, a different kind of brace than I already had. [237]

Q. Then, who advised you that you go to Dr. Berg?

A. Ernie Langley. His wife, she has got her back hurt and she told me that Dr. Berg was a good doctor and you go to him, John, and he will help you out. So, I went to him and he is the one that recommended me to go and take therapy treatment.

Q. Well, did Dr. Kimberley say that there was nothing more that would be done for you?

A. Dr. Kimberley recommended a brace for me and he told them up there that in the letter, whatever letter he give them. I don't know what he says. I couldn't tell you one thing what Dr. Kimberley says. He don't tell me nothing but he just sent me back to the U. S. Public Health and I stayed there and I was taking treatments at the U. S. Public Health Service three days a week every Monday, Wednesday, and Friday from the Public Health.

Q. Was that before you finally went back to Seattle for the final trip to the Marine Hospital?

A. No, sir. I saw him after that.

Q. You saw Kimberley after that?

A. I saw Kimberley after that.

Q. Well, that's what I'm trying to get at. Did

(Testimony of John Farley.)

Kimberley tell you not to come back to him any more or did you just not go back to him any more?

A. Kimberley was sent—I was sent from Kimberley from [238] one of the—from one of the men up in the office that called—called me up at my home out in Reedville, Oregon——

Q. Yes?

A. ——and told me to come on into their office, that they wanted to send me to a doctor. And when they did that, why, I just took and called up Leonard Alley and told him that the company had called me and they wanted to send me to a doctor and I am telling him what they told me and he told me that he would take and talk to the office. And he talked to the office and called me back and told me that I had an appointment with Dr. Kimberley such and such a date and that's when I went. And what the report was I couldn't tell you.

Q. And that was the last time you went to him?

A. That was the last time I went to him.

Mr. Krause: Very well. I think that's all.

The Court: Redirect?

Mr. Williams: I have no further examination.

The Court: That is all, sir. I just have one question.

Q. Mr. Krause made reference to the colored fellows. Now, I want to make sure I understand. Was Malcomb Edward Potts——

A. He was the steward department which is a colored man.

Q. I see. Now, when you were there in the tav-

(Testimony of John Farley.)

ern or bar, whatever it was, on the dock just before you went back to the liberty launch, was Potts there? [239]

A. Yes, sir. Potts.

Q. Did you see him?

A. I saw the colored boys all in a little table by themselves. They was drinking in there.

Q. Did you know Potts?

A. Yes, sir, I know Potts. I saw him on board the ship many a time.

Q. Did you see him there drinking that night?

A. He was in there drinking in there. They had drinks in front of them. I never saw him raise a glass to his face, or anything like that, but I presume they were drinking all right.

Q. Did you see him stand at any time? Did he stand while you were there?

A. I never noticed.

The Court: Any further questions? That is all, sir. You may step down.

How long will the testimony of Dr. Berg be?

Mr. Williams: I think I would judge about twenty minutes.

The Court: Well, maybe we had better take a break now.

(Recess taken.)

Mr. Williams: Call Dr. Berg. [240]

### RICHARD F. BERG

produced as a witness on behalf of the libelant, being first duly sworn by the Clerk, was examined, and testified as follows:



(Testimony of Richard F. Berg.)

Direct Examination

Q. (By Mr. Williams): Your name is Dr. Richard F. Berg? A. Yes.

Q. You are a physician and surgeon in this area? A. Yes.

Q. You practice in Portland, Oregon, Doctor? A. Yes.

Q. For how long have you practiced?

A. Oh, I have practiced since the latter part of 1930 in Portland.

Mr. Krause: We will concede the Doctor's qualifications, your Honor.

The Court: Is that satisfactory?

Mr. Williams: Oh, I always like to put them in, your Honor.

The Court: Very well. You may.

Q. (By Mr. Williams): Doctor, following your training in medical school where did you take your internship and such residency as you have taken?

A. I had my internship at St. Vincent's Hospital in Portland, interned at the Carney Hospital in Boston for one [241] year in the orthopedic service, eighteen months as resident surgeon at the Boston City Hospital in the orthopedic service, one year at the Hospital for Special Surgery in New York City in orthopedics.

Q. Do you do predominantly orthopedic work at this time? A. That's all.

Q. That's all you do? Your practice is limited to orthopedics? A. Yes.

(Testimony of Richard F. Berg.)

Q. When did you first see the libelant in this case, Mr. John Farley?

A. I saw him on the 21st of July of 1954.

Q. When he reported to you what were his chief complaints, if you recall?

A. At the time he reported to me he was complaining chiefly of pain, disability, and loss of motion, in the right shoulder, and pain and disability in his back, chiefly at the lower dorsal and the upper lumbar level.

Q. What did your examination of him show?

A. Well, examination showed marked limitation of rotation both the internal type and the external type of his right shoulder (indicating). He could only abduct the shoulder to about eighty degrees beyond which he complained of severe pain and discomfort.

Q. Abduction is a movement directly—— [242]

A. From the side of the body.

Q. ——from the side of the body?

A. From the side of the body upwards. His back motions were limited in all directions both forward, lateral, and backward movements together with a marked restriction in rotation to the right or left of the spine.

His points of maximum tenderness were in the lower dorsal and upper lumbar sections of his back although he did have some local tenderness on pressure at the lumbo-sacral level which is the lower part of the lumbar back.

Q. Were X-rays—did you order X-rays taken of him?

A. Yes.

(Testimony of Richard F. Berg.)

Q. Do you have those X-rays with you, Doctor?

A. Yes, I do.

Q. Yes. Will you put them in the viewer and indicate to the Court what your findings were therefrom?

The Court: Are they reserved a number in the list of exhibits?

Mr. Williams: This is under Number 2, your Honor, doctor's office records and X-rays of libelant.

The Court: Have they been marked as yet?

Mr. Williams: I believe they have not been marked. They should be Number 2.

The Clerk: Libelant's Exhibits 2-A, 2-B, 2-C.

(Whereupon X-rays were marked Libelant's [243] Exhibits 2-A, 2-B, 2-C for identification.)

The Court: Any objection to these?

Mr. Krause: We have none.

The Court: They will be received.

(Whereupon Libelant's Exhibits 2-A, 2-B, 2-C previously marked for identification were thereupon received in evidence.)

The Witness: This X-ray is a lateral view taken on the 1st of July of '54 in the case of Mr. John Farley, as are all of these, and the number is 2-A. I believe you said '51. No, 2-B. This is it taken from the right side in the lower dorsal area showing the compression in the seventh and eighth dorsal vertebrae which are fairly well healed at this time.

The Court: May I interrupt, Doctor. If counsel wish you may come closer to view the X-rays.

Mr. Krause: Thank you.

(Testimony of Richard F. Berg.)

The Witness: Seven and eight, as I pointed out here (indicating). He has, in addition, of course, quite a marked amount of pre-existing osteoarthritis on the edges of these vertebrae. All right.

This is a picture taken from the left side in the upper part of the dorsal region. It shows no further [244] fractures that we can see at this time.

The next one is a view of the lumbar spine showing the twelfth dorsal which is compressed and, in our opinion, was the site of a previous compression fracture. The first to the fifth lumbar show no definite fractures with some arthritic spurring. This is a spot plate taken across the twelfth lumbar—twelfth dorsal, rather, showing the compression of that vertebra in comparison to the others.

Q. (By Mr. Williams): Doctor, are you indicating generally a wedging?

A. Wedging of the vertebra in comparison to the normal contours below.

Q. Which side of the picture is the inside of the body?

A. The inside is right here (indicating). You notice the marked concavity compared to the smooth cavity of the normal vertebral body. An X-ray taken at the lumbo-sacral level on account of his pain there discloses no fractures but considerable arthritis developing in his back. This is the hip looking from the side.

Q. Are the lumbo-sacral articulations to be seen in that film?

A. Yes. The right side which was all right. Just



(Testimony of Richard F. Berg.)

another view from the opposite side of the dorsal vertebra showing our compression of our seventh and eighth dorsals. [245]

This is a picture taken to the pelvis showing both hip joints, pelvic structure, the lumbo-sacral articulation from the front view, and no evidence of fracture in this area that I could see. He has considerable arthritis both at the hip, the sacroiliac joint on both sides, and in the lumbar vertebra.

The front view taken through the dorsal spine reveals normal aeration in the lungs and normal heart shadow, arthritis in the edges of the dorsal vertebra, the fractures of the seventh and eighth, and considerable wedging of the twelfth. I think that's all on that one.

This is a picture taken at the lumbo-dorsal level showing the first lumbar with the twelfth just above it, marked arthritis in this area (indicating).

Q. Which area is that that you were indicating?

A. In the region of the—let's see—one, two—between two and three.

Q. Lumbar?

A. On the right side. X-rays taken of the shoulder—right shoulder show the old injury to the end of his clavicle, fracture through there which is healed (indicating) with arthritis in the acromioclavicular joint. And aside from that very little.

This is a different view taken with the arm rotated (demonstrating) showing a similar situation.

Now, the 2-C exhibits were taken by me at my direction on the 12th of April of 1955 almost about

(Testimony of Richard F. Berg.)

ten months later. Now, this shows our right shoulder again blown up for clarity, shows the old fracture at the distal end completely healed with the arthritis in this acromioclavicular joint. The straight anterior-posterior view of the right shoulder showing the old deformity of the clavicle. But, aside from a little arthritis in the lower portion of the shoulder joint the picture shows no definite change. The dorsal spine shows the narrowing of the seventh and the eighth, the twelfth, and a little area which we noted on the subsequent films which might have been a slight, either an arthritic spur or slight compression of the edge of the tenth. Marked arthritis is still present throughout his dorsal spine. The anterior-posterior view of the dorsal spine shows the same deformity without very much change from the previous pictures a year ago. Still present, the fractures in the seventh and the eighth, twelfth.

Q. Do you notice anything in the fourth dorsal in that film, Doctor?

A. Well, this is the fourth dorsal (indicating) and there is kind of a distortion in the shape of that vertebra at the present time. Whether or not that's a fracture that may have been overlooked or not I can't say at this time. That certainly is compression.

Q. Would earlier films assist you? [247]

A. They might if you had some and there wasn't that same deformity in them.

Q. No. I mean, films nearer the date of injury?

(Testimony of Richard F. Berg.)

A. Yes, that's what I mean. They might very definitely. This is taken in the lumbar region again, the tenth dorsal is still compressed but completely healed, and the arthritis is still present throughout the lumbar spine. Lumbo-sacral junction shows no further change other than the arthritis which was previously mentioned.

Here is another view of the shoulder showing no change from the previous.

This is a front view through the lumbar spine showing no appreciable change, still the marked arthritis between two and three previously mentioned. The arthritis in the sacroiliac (indicating) and the narrowing of the hip joints with arthritis. The upper dorsal spine shows the same general configuration as the previously shown ones.

Mr. Williams: Mr. Krause, would you mind introducing the hospital records which you have from the Public Health Service which contain the X-rays so that the doctor may examine them?

Mr. Krause: Yes, I will be glad to introduce them. The Public Health Service records and also the X-rays.

The Court: Number 4 and 5.

Mr. Williams: The X-rays are 4 and the other ones are 5? [248]

Mr. Krause: Yes.

Mr. Williams: The X-rays are 4, are they not?

The Court: The X-rays are 4, yes. Are those received without objection?

Mr. Williams: Yes, they are.

(Testimony of Richard F. Berg.)

The Court: They will be received.

(Whereupon X-rays as Respondent's Exhibit 4 and Public Health Service records as Respondent's Exhibit 5 were marked for identification and received in evidence.)

The Witness: This picture was taken in—on the 15th of July of 1953, is a side view showing the dorsal spine, seventh and eighth are compressed and six, five, four, still shows the same amount of arthritis spurring in here (indicating).

Q. (By Mr. Williams): Do you notice anything on the tenth from that film? Can you observe—

A. Well, let's see—eight, nine, ten. No, I don't see anything that looks like anything. There is no distortion that I can see there.

Q. Yes?

A. This is a front view taken on the 14th of July of '53, U. S. Public Health Service Hospital. It shows the seventh and the eighth and also the same slight deformity in this [249] view of the fourth.

The Court: Doctor, do you see any fracture in the seventh or eighth that you referred to?

The Witness: Well, yes. You see the compression mashed down.

The Court: I see.

The Witness: You can very seldom ever see a fracture line. It's just a compression.

The Court: I understand.



(Testimony of Richard F. Berg.)

Q. (By Mr. Williams): Does the twelfth show in that film or is it off to the bottom there?

A. Well, it's right here (indicating). It doesn't show very much.

Q. A side view would be necessary to show the wedging of it?

A. Yes, that's right. Can't see it from the front. There is your lumbar spine, front view, taken in '53 of the fourteenth and it shows the same arthritis I pointed out.

Here is your side view. Here is your twelfth. Now, right there it shows the wedging of the twelfth.

Q. The wedging on the anterior surface?

A. On the anterior.

Q. Yes.

A. And then your lumbar come down. [250]  
Do you have any before these of '53?

Mr. Williams: The U. S. Public Health Service has the '52 ones. I don't know, they were in the safe, I might say, and I examined them with the Doctor about three days ago. As to whether they have been sent up, I don't know.

Mr. Krause: In what safe? Where?

Mr. Williams: On the second floor of this building.

The Witness: January of '52. These are of the lumbar spine. No fractures that I can see in there.

This is the shoulder in '53, the old deformity, the deformity of the clavicle.

Here is one in '52 on the 12th of August of '52

(Testimony of Richard F. Berg.)

taken in Seattle. These show the well-advanced arthritis that I mentioned between two and three. But, no other changes. The twelfth is narrowed.

The same view to the shoulder taken in '53, the deformity of the clavicle.

August, again, of '52, same general configurations.

These are taken on June the 13th of '52. This shows the same compression, the seventh and eighth. I rather think that is an arthritic spur on the fourth dorsal there (indicating).

Q. (By Mr. Williams): Do you have a side view of that?

A. Yes. We have looked at them. They are narrowed the same way. Same proposition as there (indicating) with [251] arthritis.

Q. Down in the lumbar area?

A. Yes. And, the right hand has got a roughening of the greater multangular bone here (indicating), some roughening of the scaphoid bone too of the wrist. '52 again, twelfth dorsal narrowed, seventh and eighth. Similar view in the twelfth dorsal for the dorsal still shows deformity in '52.

Q. Is it on the right side or left side?

A. Well, let's see—this is the left side area. Here is the heart shadow (indicating) so it's on the left. That is just a general lateral view, no change.

Same thing here. This is more recent. It shows the fracture more recent. I can't see the date on it. '52. You see the recent—now, this, your Honor, is a recent fracture there (indicating).

(Testimony of Richard F. Berg.)

The Court: Yes.

The Witness: You can see that now on the twelfth.

Q. (By Mr. Williams): The shadowy area there indicates——

A. Yes. Right here (indicating).

Q. ——that it is fairly short after the particular injury?

A. Yes. It is not so far away now. These are all healed in '53.

This is the right hand again in '53 of January. It shows the roughening of these—the greater mult-angular [252] which is at the base of the thumb. But, I don't see any fractures in there (indicating).

This, I believe, is in '53 and again shows all those things. That is the lumbar spine and a lateral lumbar.

Q. Doctor, I am going to hand you this particular exhibit. It is not an exhibit, it is just a model, for purposes of assisting you in explaining this matter to the Court, assuming counsel has no objection.

Mr. Krause: Well, I don't know what counsel is going to do with it, whether I have any objection.

Mr. Williams: Well, I am simply going to ask the Doctor to explain certain matters with this model in hand to assist him in explaining it. It is not going to be introduced.

Mr. Krause: I haven't any objection at the moment.

The Court: All right.

(Testimony of Richard F. Berg.)

Q. (By Mr. Williams): Is that a normal spine as you view it?

A. Well, it is part of a normal spine, part of the cervical vertebra gone.

Q. The upper vertebra? A. Yes.

Q. Where is the first dorsal on that figure?

A. The first dorsal is right here (indicating).

Q. Now, Doctor, in examining those X-rays you stated, I believe, that you noticed these marked compressions of the [253] seventh and eighth dorsal vertebrae? A. Yes.

Q. Which would be those two right there (indicating)? A. These two (indicating).

Q. Now, is there a loss in body in them over-all besides the wedging?

A. No. They are just simply jammed together, compressed, so to speak.

Q. And do you notice also the wedging of the twelfth? A. Yes.

Q. You mentioned that you noticed that to a lesser extent on the tenth, is that correct?

A. Yes. That is just a little edge on the front edge.

Q. An edge off the tenth?

A. Yes. That's right.

Q. Then, you said you noticed a deformity of the fourth that you are uncertain as to whether that is—I believe the last thing you said was you thought it might be arthritic, is that correct?

A. I think that is an arthritic thing in my best judgment, yes.



(Testimony of Richard F. Berg.)

Q. Yes. Now, can you describe, if a body of a man were to fall about approximately nineteen feet and land on the head and shoulders of another man, can you describe the particular strain it would place on this spinal structure? [254]

A. Well, it would exert quite a severe strain. I mean, it would cause a compression of the whole dorsal spine and the lumbar spine, and the weakest point would probably give and compress and that is the point at which the maximum compression and strain was transmitted which in this case would be in the lower dorsal region.

Q. Would you normally expect some—that most of the force would be on the anterior side of those vertebrae?

A. Well, on account of this curve——

Q. Or, the curve?

A. ——and the mechanics it would have to be on the front side. If this was reversed so that the curve was that way (demonstrating) it would be transmitted to the back side. But, inasmuch as the normal curve of the spine is in this way the forces are transmitted in that way.

Q. I see. Now, Doctor, those projections that stick out from either side——

A. These?

Q. ——these are called transverse processes?

A. These are transverse processes.

Q. What is their function?

A. They are merely anchors for the lumbar muscles and back muscles.

Q. Muscles and ligaments and things of that

(Testimony of Richard F. Berg.)

nature? A. Yes, muscles and ligaments. [255]

Q. With a force sufficient to cause multiple compression fractures such as you have shown in the X-rays, would you anticipate that there would be damage to the muscles and soft structures that are anchored onto those transverse processes?

A. Well, muscles are rather few in this dorsal area because the rib cage comes out over here (indicating). The heavy muscles are in the lumbar region. They attach to the ribs and along the spine in that area (indicating). However, there are some muscles in the back region here, so-called backstrap or erector spinalis group which would be certainly stretched.

Q. Yes. By a force sufficient to cause——

A. That's right.

Q. ——multiple compression fractures?

A. And also all those little ligaments too here in the back that hold these joints together would be stretched and strained.

Q. Yes. In examining John Farley upon his first visit to you and upon your reading of the X-rays was it your conclusion that there had been a strain of the muscles and ligaments through the back by reason of the injury? A. Yes.

Q. And did you think that it existed at the time that you saw him? [256]

A. Yes, I did definitely.

Q. That was over two years after the accident?

A. Yes.

The Court: Do we have that date fixed as yet?

(Testimony of Richard F. Berg.)

Mr. Williams: April 6, 1952, your Honor.

The Court: No. I mean the visit of Dr. Berg?

The Witness: 21st of July, 1954, your Honor.

The Court: Thank you.

Q. (By Mr. Williams): Did you find—I think you mentioned in the X-rays the presence of arthritis in the spine. What do you mean by that, Doctor?

A. Well, arthritis is an overgrowth of bone cartilage, soft tissue, or envelopery tissue in and around joints.

Q. What is it due to generally?

A. Well, it is due, we think, to the multiplicity of insults incidence of the normal activity of active life. And, especially it is very common in heavy work—people who do heavy work. It is a penalty of the increase in years.

Q. You say it's normal incidence is the normal wear and tear of life? A. Yes, I would say so.

Q. Now, do many persons having osteoarthritis in their back have it in any other parts of their body?

A. Yes, I think a large percentage of people do.

Q. Over what age would you say? [257]

A. Oh, after they are fifty years of age.

Q. Now, in those persons who have it is it also quite frequent that the condition causes no pain or disability?

A. That is very commonly encountered.

Q. Is it also quite common that any sort of a traumatic injury, a substantial one, will cause a

(Testimony of Richard F. Berg.)

flaring up or an aggravation of that dormant arthritis?

Mr. Krause: I don't recall that there was any pleading here of an aggravation of a pre-existing condition.

Mr. Williams: That is exactly what was pleaded, though, Mr. Krause.

The Court: I didn't hear you, Mr. Williams.

Mr. Williams: It is pleaded, your Honor, oh, yes, directly and specifically. I refer to contention 3 of the pre-trial order, your Honor. I am sorry, I do not have the pages correct. But it starts on one page and goes over to the next page. It states in here "and an aggravation of a pre-existing osteoarthritis in the dorsal spine which was previously causing libelant no pain or difficulty." Do you find that, Mr. Krause?

Mr. Krause: "aggravation of a pre-existing arthritis." I am sorry, your Honor, I overlooked that.

The Court: Very well.

Mr. Williams: Would you read the question back? I think there is a question, I believe. Would you read it [258] please, Mr. Reporter?

(Last question read.)

The Witness: Yes, I think that is generally accepted in the medical world.

Q. (By Mr. Williams): Do you often find that to be true in the persons you examine? A. Yes.

Q. What is your conclusion as to Mr. Farley's present symptoms of arthritic pain if you find them?

A. Well, of course, he has improved since I saw



(Testimony of Richard F. Berg.)

him originally. He has a much better range of motion in his shoulder. He has worked there strenuously trying to improve his back movement and condition. I have assigned him to lots of extra curricular work at home, chores, and things to try to loosen him up. I have asked him to carry out exercises aimed at loosening and bending his back and, as a result of it, I think he has considerably less pain than when I first saw him.

He does, however, have the pain and stiffness to a moderate degree.

Q. Would an injury sufficient to cause multiple compression fractures just as you found in Mr. Farley normally place a strain on the lumbo-sacral articulations of the spine?

A. Yes. Because the lumbo articulation is really the fulcrum of it.

Q. Could you hold that up just a little higher, Doctor? [259]

A. Yes. The lumbo-sacral is really the fulcrum of this lever which is the spine and any stresses or strains imparted to the upper part would be directly impacted on the lumbo-sacral joints.

The Court: As I understood you, Doctor, you said the pictures appeared to be normal in that respect in regard to any injury.

The Witness: Yes, your Honor. I could see no fracture.

Q. (By Mr. Williams): What sort of an injury would you expect in that area from——

A. Well, in the absence of evidence of injury——

(Testimony of Richard F. Berg.)

of course, as you will notice these vertebrae are much heavier and stronger than those above because they are used to and subjected continuously to heavier strains, therefore they break much less easily.

Q. Yes?

A. So, what we usually expect in those cases is a strain of these ligaments in the back of the joints.

Q. That hold that process in position?

A. That's right.

Q. Did you find any other causes for pain and discomforts in the dorsal or other areas of the back upon examining Mr. Farley?

A. Well, I think the arthritis and the straining of those muscles, the very obvious compression fractures, were sufficient. I don't remember anything else that he had there. [260]

Q. No. But, what I am wondering, Doctor, is you normally get a certain amount of irritation of nerve roots from an injury of this nature?

A. Well, I think that is usually seen in any fracture case on account of the swelling.

Q. Yes?

A. The pressure on the adjacent nerve roots is a bothersome symptom. In fact, that is why we have the pain——

Q. I see.

A. ——from them is the swelling and pressure on the nerve roots. We accept that without thinking about it, mostly.

Q. What is reticulitis?

(Testimony of Richard F. Berg.)

A. Reticulitis is an irritation of a nerve root. Reticuli are the ones which come out from the—closest to the spine.

Q. I don't think we will need the exhibit any more, Doctor. You can set it down there instead of holding it so long. Upon examining Mr. Farley what did you—what course of treatment did you prescribe for him?

A. Well, I prescribed heat, massage by the physiotherapists, I prescribed that he should himself participate in this activity carrying out prescribed exercises at home, that he should make every attempt that he could to loosen the stiffness in his back and the shoulders by exercise, to do as much as he could around the house in the way of work short of lifting. Of course, I advised him to do no lifting whatsoever. [261]

Q. You consider it to be dangerous to his health if he were to lift?

A. Heavy lifting is contraindicated in these cases.

Q. Did you advise him to return to heavy work?

A. No, I have never done that.

Q. Would you advise him not to?

A. Well, I have told him he can't do heavy work.

Q. Yes. Insofar as Mr. Farley's ability to do heavy work is concerned, what do you think his condition is right now; that is to say, do you think it is still flexible or it is stationary or will get better or will get worse or what?

(Testimony of Richard F. Berg.)

A. Well, I think he has practically reached the maximum degree of improvement now.

Q. You do not expect that he will——

A. Not very much. Although I can't look into the future, I don't anticipate too much more.

Q. Do you expect that he will ever be able to do heavy work again?

A. Well, I don't think so. I don't think he should.

Q. Is it your opinion that he is totally disabled from heavy work?      A. I believe so, yes.

Q. Now, you have examined Mr. Farley from time to time, Doctor, and do you find him to be in good health generally other than this disability, or what would you say that way? [262]

A. Well, I would say aside from the normal wear and tear of generalized arteriosclerosis that men have at his age who have lived a vigorous arduous life that he is in as good a condition physically as the average man.

Q. But, he has no other illnesses?

A. Not that I know of.

Q. That are compounding these difficulties that you know of?      A. Not that I know of.

Q. When you examined him from time to time, Doctor, was that at your request that he keep coming back checking with you for periodic examinations?

A. Well, yes. I had him placed in the physiotherapy department for treatments there and then I tried to follow him through and advise him as to



(Testimony of Richard F. Berg.)

additional exercises from time to time and check him to see what his progress was.

Q. You have directed different exercises for him? A. Yes, that's right.

Q. Such as physical therapy and treatment over there at the—that's at the Portland Rehabilitation Center? A. That's right.

Q. And you have examined him from time to time to see what his progress was? A. Yes.

Q. And it is your opinion that he will not progress substantially more from his present condition?

A. I don't think so.

Q. Would you say it is probable that he will not?

A. Yes, I would say it is probable he will not—

Q. His condition—

A. —advance very much farther.

Q. —his condition is substantially stationary at this time? A. That's right.

Q. Do you find Mr. Farley to be a cooperative patient? A. Very.

Q. One who attempts to follow your directions?

A. Yes, indeed.

Q. Does he attempt to help himself as much as you can tell.

A. I think he has been unusually good about that because I have asked him to do as much as he can and participate actively in this treatment.

Q. Do you consider that he complains a great deal about his pain insofar as you can tell?

A. No, I don't think so. I have never felt that way about it.

(Testimony of Richard F. Berg.)

Q. You don't feel that he is inclined to exaggerate his symptoms?      A. Not at all.

Q. Yes.

A. If he was he certainly wouldn't be improving as he has. [264]

Q. Doctor, in the future do you think that Mr. Farley would be able to follow some light employment of some sort?      A. Yes, I do.

Q. Yes. Could he do desk work and office jobs?

A. Yes.

Q. If he were trained to do that?      A. Yes.

Q. What type of employment; that is to say, the disabilities that he has, what type of employment would he be limited from doing? That is to say, for example, can he do bending easily, that sort of thing?

A. Well, he can bend within reason as long as he doesn't lift.

Q. Yes.

A. But, I would suggest the main things he should be restricted from, in my opinion, would be heavy lifting, climbing, and any work which would require a great deal of excessive muscular strain.

Q. What about considerable walking and that sort of thing?

A. Well, of course, I don't think at his age he should do too much walking anyway.

Q. What about prolonged standing?

A. Well, I don't know about that hurting him so much if he wasn't too fatigued.

Q. Yes. As far as light occupations are con-

(Testimony of Richard F. Berg.)

cerned, Doctor, [265] to what percentage do you consider Mr. Farley is disabled?

A. As far as light occupation?

Q. Yes.

A. Well, on the basis of his back and shoulder and the stiffness in his muscles attached to his back and shoulder I think he has a disability of about 50 per cent.

Q. As to light occupation? A. Yes.

Mr. Williams: You may examine. That's all.

### Cross Examination

Q. (By Mr. Krause): You are now having in mind when you say a 50 per cent disability for light occupation quite a variety of light occupations, aren't you?

A. That's right as I described nothing about the strenuous ones.

Q. Well, I thought you had eliminated the strenuous already?

A. As far as I am concerned that is a total as far as he is concerned, strenuous ones.

Q. Well, then, when you say he is 50 per cent disabled now is that that he can only do 50 per cent of a light occupation?

A. 50 per cent of the average. Because, I think he will fatigue and tire out. I think there will be days when he will have recurrence of pain due to his arthritic condition. [266]

Q. Well, due to his arthritic condition. Is it due to this accident or the arthritic condition?

(Testimony of Richard F. Berg.)

A. Well, all I can say is that he tells me he had no trouble before so I have to assume that that is truthful and as a result of this aggravation that he has had of his arthritis that he may have, occasionally, flare-ups of it in the future also.

Q. Well, there are many light occupations that he should be able to do 100 per cent, aren't there?

A. For a time, yes.

Q. Well, you mean until his back starts aching?

A. That's right.

Q. You said that he was a cooperative patient?

A. Very.

Q. Because of the fact that he did what you suggested that he do?

A. Well, not only that but I think he was trying to help himself. He has made steady progress.

Q. Well, of course, you did say that he did the things that you suggested that he do?

A. He probably did more too.

Q. Well, you know we are trying to find out what you know, Doctor, not what might have happened. Now, you didn't actually check whether he did any of the things that *he* suggested that he do, did you?

A. No, sir, of course not. I don't live anywheres near him so I don't know whether he did.

Q. So, therefore, when it comes to cooperation and you say that he did the things you suggested that he do you took his word for it?

A. Well, only his home situation. The rehabilitation center sent me reports on him occasionally that he was doing well there.



(Testimony of Richard F. Berg.)

Q. Yes. Now, what did you suggest that he do, Doctor?

A. Well, I told him he ought to carry out bending exercises, he ought to do all the light chores which he could possibly do around home that would not consist of heavy lifting but would help him regain his strength and keep his muscles in tone.

Q. Well, by the way, what is his muscle tone according to your last examination?

A. His muscle tone is pretty good.

Q. Indicates that he is using his arms?

A. Well, he has a very good range of motion now in his arm which, as I stated to you previously, was quite complicated when I saw it.

Q. But, the muscle tone in his arm——

A. Muscle tone has improved considerably.

Q. Well, since we don't know exactly what it was before we don't know what it is when you say it is improved. How [268] does it compare to the average man of his age?

A. Well, I think it compares fairly favorably with the average man of his age now.

Q. And, it would indicate that he was using his arms on some kinds of work?

A. Yes, I hope he has been.

Q. What about his legs?

A. Well, the walking takes care of that.

Q. The walking or climbing stairs? A. Yes.

Q. At any rate, his leg muscles don't appear to be atrophied, do they? A. No, I don't think so.

Q. And, their tone is good?

(Testimony of Richard F. Berg.)

A. Yes; quite good.

Q. Now, when you say no heavy lifting, what weights are you thinking of?

A. Well, I am thinking of weights from 50 pounds, 75 pounds, up.

Q. Oh. But, for carrying a bucket of water weighing from twenty to thirty, forty pounds that is perfectly all right, is it? A. Yes. Short time.

Q. Would he be able to do this work in connection with the maintenance of a considerable flock of chickens, feeding [269] them, watering them, cleaning out the hen houses, picking up the eggs, work of that sort?

A. I would think so. I should think so.

Q. What do you think, is he capable of doing the maintenance work around houses, for example, painting and the plumbing, repair and adjustments, other work that you have to do in the maintenance of houses?

A. Well, of course, painting is hard work. I don't know whether he can do that or not.

Q. Well——

A. Minor plumbing, I think he could do, sure.

Q. Just using a brush and running it over the boards would be——

A. That is very hard work if you have ever tried it.

Q. I have done much of it, Doctor.

A. So have I and it is hard work.

Q. So, I know what it is. This spine that you

(Testimony of Richard F. Berg.)

were using there to illustrate things, is that normal size for a man of his age, of his size?

A. Oh, I don't know what size this one is. It's about—well, it is a little short. I don't know what the age is in mine so I don't know much about it.

Q. Well, those aren't real vertebrae?

A. Oh, yes. These are real.

Q. Those are real? But you don't know how old? Oh, I [270] thought it was stated here it was a cast of some sort?

A. Oh, it's a real vertebrae.

Q. All right. Well, are his vertebrae larger than those? A. Yes.

Q. Now, from any of your X-rays could you tell how long before the time you took your X-rays, approximately, that the injury to his vertebrae was occasioned? A. No, I don't think so.

Q. That is, on the X-rays that you took you would not be able to tell from the appearance of those X-rays whether those fractures occurred two years before or four years before?

A. No, I don't think so.

Q. Nor even longer than that, I might say, a period of ten, fifteen years ago?

A. Well, as I say, I don't know. They just occur, that's all. But, you have ample proof of it there in your own X-rays.

Q. Well, you found one X-ray where you said that that showed a new fracture on one vertebrae, is that correct?

(Testimony of Richard F. Berg.)

A. That was—yes. That was very clear on that one.

Q. Yes. Well, did you find another one?

A. No. Because, the pictures were not good enough so I could see through them sideways.

Q. Well, of course, as far as these X-rays that are in [271] evidence here are concerned at any rate there is only one that shows one vertebra with a recent fracture, is that a correct statement?

A. That I could see as a recent fracture, yes.

Q. And how recent did that indicate to you that it had occurred?

A. While it was still in the fresh stage. So it couldn't have been too far back.

Q. Well, can you give us any estimate as to months or weeks?

A. Oh, in the past few months, yes.

Q. It would be in the past few months?

A. Yes.

Q. That was an X-ray taken about June or July of 1952?

A. Correct.

Q. Now, from your examination of your X-rays taken about—well, a little over two years after this accident occurred, is there anything in the X-rays that indicates that some of those fractures were earlier than two years and three or four months prior to that?

A. No.

Q. Of course, the healing on those vertebrae in your X-rays is complete, isn't it?

A. Well, yes, it is complete as we see them.

Q. There are no rough edges of any sort ap-



(Testimony of Richard F. Berg.)

pearing that [272] might have been due to their being fractured or compressed?

A. Well, there are rough edges but they are healed edges.

Q. Any fractures that existed there have been healed?

A. That's right.

Q. You had made an estimate, Doctor, hadn't you, as to what the extent of disability was on account of the injury to his shoulder?

A. Shoulder and back.

Q. Well, didn't you take them separately?

A. No. I took them both into consideration.

Q. On this last X-ray that you gave us here?

A. Yes.

Q. Yes. But, didn't you, in one of your reports, estimate them separately?

A. I don't remember whether I did or not. But, checking him the last time, taking into consideration the disability he has in his shoulder and in his back, it was my humble opinion that he had approximately 50 per cent of non-specified disability.

Q. Is that 50 per cent approximately equivalent of the loss of use of one arm?

A. I don't know how they figure it in the U. S. Public Health Department.

Q. Well, so that we might get some idea as to what you have in mind, when you say a 50 per cent disability would [273] you ordinarily rate a man with the loss of use of one arm as being about 50 per cent disabled?

(Testimony of Richard F. Berg.)

A. Well, that would depend, of course. You would have to take into consideration not only the loss of his arm but his occupation. If he was a professional violinist and he lost the right arm, why, as far as he was concerned it would be a very heavy loss. But, if he was a man who was a left-handed operator for some mechanical device it wouldn't be as great. In the State, of course, State Accident Commission, their specified disabilities are fairly clear. Those in the back, however, are hard to classify because we have no definite way of pinning them down other than by an arm or a leg, comparing them.

So, in this case I didn't specify arm or leg but I said in a general way a 50 per cent of what the average individual of his age would be able to carry out.

Q. Well, I had that in mind that under the compensation act if there is an injury to a back the doctors ordinarily rate it in comparing it to the loss of an arm or the loss of a leg. A. Yes.

Q. And, if by your giving him a rating of just a 50 per cent disability, does that in general mean that he would be able to do about half of the work that would be required of an ordinary working man?

A. That's exactly what I tried to imply.

Q. That he would either be able to do the full work half of the time or half—

A. Not half of the work all of the time.

Q. —or half of the variety of the work all the time? A. That's right.

(Testimony of Richard F. Berg.)

Q. Is that curve on that spine that you had there while you were illustrating your testimony—is not the natural curve, is it?

A. No. There is another curve too. Insofar as the dorsal spine is concerned it's about the normal curve. But, there is an opposite curve in the lumbar spine.

Q. And, actually, though, if you had as much of a curvature *is* they showed in that it would indicate a considerable stoop-shouldered condition, wouldn't it?

A. No. I think that is about the average curve for the straight individual.

Mr. Krause: I think that's all.

The Court: Redirect?

Mr. Williams: I have just a couple of short questions.

### Redirect Examination

Q. (By Mr. Williams): When Mr. Farley visited you did he make complaints about other areas than his back or his right shoulder; that is to say, did he complain about any pain in his knees or [275] his ankles or his feet, or anything like that?

A. Well, from time to time he had generalized arthritic pains in his extremities also which, in my opinion, are on the basis of his arthritis.

Q. Would they in turn be due to the aggravation caused by the injury?

A. Oh, I didn't attribute them to that. I thought

(Testimony of Richard F. Berg.)

it was a normal consequence of the arthritic situation that he had.

Q. The small ones in the extremities?

A. That's right.

Q. Did he complain about a great deal of pain other than in his back or shoulder?

A. No. His class of complaints were in his back and shoulder.

Q. Will that pain continue, in your opinion?

A. As I stated previously, I think this gentleman will have pain from time to time in his back.

Q. You would expect that through the rest of his life?      A. I think so.

Mr. Williams: I have no further questions.

The Court: Doctor, do you have an opinion as to whether or not the Libelant, in his physical condition as a result of the injuries received, has become stationary now?

A. Well, your Honor, insofar as I am able to tell I think he has, as I stated, reached maximum improvement from his [276] injury. Now, his physical condition is another situation.

The Court: Perhaps I used the wrong word because you answered what I had in mind.

The Witness: The arthritis, as I say, will flare up from time to time.

The Court: Yes, I understand.

Q. Now, when do you think, based upon your examination, your X-rays, and the evidence that you have testified to here—now, if you have any other information I want you to tell us—but based



(Testimony of Richard F. Berg.)

upon what you have testified to here and shown us in your X-rays, do you have an opinion as to whether, during the period of time either prior to the time you saw him or during the time that you have seen him, did he reach this maximum cure?

A. Well, I think he reached it just recently because it was only recently he has developed the good range of motion in his shoulder and in his back. This man can now almost touch the floor by bending which is due to the fact that he tries hard himself to do it.

The Court: I realize it may be difficult but do you have an opinion?

The Witness: The last three months.

The Court: Any further questions?

Mr. Krause: We have none.

Mr. Williams: No further questions. [277]

The Court: Very well. Thank you, Doctor.

Mr. Williams: I don't think Exhibit 2 has been introduced, your Honor, in its entirety.

The Court: My notes do not disclose any doctors' office records.

Mr. Krause: Well, we are going to have Dr. Cohen here and I don't know that that written report of his could be introduced.

The Court: It certainly would be hearsay unless——

Mr. Williams: I don't want to introduce it at this time, your Honor.

The Court: Very well.

Mr. Williams: I wish to offer in evidence Ex-

hibit Number 3, report of William J. Accurso, of the United States Coast Guard, dated August 21, 1952.

The Court: What is the Defendant's position about that, Mr. Krause?

Mr. Krause: Captain Accurso's deposition was taken and I don't recall this having been shown to him at the time of the taking of his deposition. I assume if counsel wishes to use it he could use it for the purpose of impeachment, but since his testimony was taken I think it was obligatory upon them to show it to him.

Mr. Williams: Mr. Krause, it has already been—the identification of this has already been made. There is no [278] question about its identity, is there? It has a certification on it from the Coast Guard.

Mr. Krause: I don't question its identity but I don't know upon what theory it is admissible in evidence as primary evidence.

The Court: You contend it is a part of the business records?

Mr. Williams: Well, your Honor——

The Court: You understand what I mean, the uniform——

Mr. Williams: Yes.

The Court: Otherwise, it just occurs to the Court without looking at it that it is purely hearsay. Now, if you have something clearer about it I would be pleased to hear you.

Mr. Williams: Well, it is the Captain's report

itself. I will withhold that, your Honor, until the deposition is introduced.

The Court: Very well.

Mr. Williams: Now, I will offer in evidence the deposition of Malcomb Edward Potts. I have no desire to read it unless the Court desires it to be read. I assume the Court will have an opportunity to look it over. And, if counsel wishes to make any objection to portions of it, of course, he can do so.

The Court: Well, I will be pleased to hear from counsel [279] if I am in error about the matter but I have always taken the position before that deposition as such was not in evidence. The deposition may be marked for identification so it becomes a part of the general record for identification but it is a matter of the reading of the deposition into evidence so that the trier of the facts will hear the testimony rather than have it before him in written form. Otherwise, it tends to give extra weight as opposed to the testimony of a deponent who appears in open court and gives testimony. Now, I will be pleased to hear what your theory is about it.

Mr. Williams: Your Honor, I have no preference about that. Mr. Krause, I am sure, has numerous depositions. These cases are often tried with many depositions because of the fact that the thing moved around.

The Court: I can understand that. Counsel might stipulate that instead of burdening the record, stipulate that the Court may read it.

Mr. Williams: Either way would be all right. I would appreciate counsel's remarks on it.

Mr. Krause: Well, your Honor, the practice has developed in this court of some of the judges refusing to permit the reading of the depositions in evidence.

The Court: They go to the jury as part——

Mr. Krause: Well, no, not in jury cases. But, in [280] admiralty and equity cases.

The Court: I see.

Mr. Krause: And, the judges say that they will take them and read them. Now, it does seem to me that particularly in a case of this sort—and as far as I am concerned it is agreeable to me to consider these depositions received in evidence. Now, there are these objections on the ground of materiality and relevancy which were reserved. They are not even made in the deposition, don't have to be.

The Court: Of course, as far as the admiralty courts are concerned, you have to assume that they disregard hearsay.

Mr. Krause: We will assume that the Judge would disregard those matters. So, I am prepared to stipulate that the depositions that either party wishes to have considered be read in evidence here.

The Court: Well, let's mark them for identification, then, and then we will read it into the record.

Mr. Williams: They are all marked as exhibits.

The Court: Very well.

Mr. Williams: Do you wish them read into the record, your Honor?

The Court: No, I know of no reason for burdening the record. But, I will invite counsel to do this,



that if you have some particular parts of the deposition that you want [281] the Court's attention called to I will entertain your calling my attention to the pages.

Mr. Williams: All right. Would you wish us to do that at the time it is introduced or upon final argument or what, sir?

The Court: Whatever you desire about it. If you want to present a memorandum you may do so or if you want to wait and present it to the Court orally you may do so.

Mr. Williams: I think in order to get the witnesses on we will just dispense with that for the moment.

The Court: All right. Fine. But, I will invite you to do that if you care to. Because, I can understand that each one of you would have your respective theories to the importance of the testimony of any deponent.

Mr. Williams: We will also offer into evidence the deposition of Ray H. Robinson.

The Court: It will be taken by the Court under the stipulation.

Mr. Williams: I will offer into evidence Exhibit Number 4, Notice of Claim, dated March 25, 1954.

Mr. Krause: No objection.

The Court: It will be received.

(Whereupon Libelant's Exhibit 4 for identification, Notice of Claim, dated March 25, 1954, was thereupon received in evidence.) [282]

[See page 455.]

Mr. Williams: I will offer into evidence Exhibit

Number 8, letter of David R. Williams to Krause, Lindsay and Evans, Attorneys at Law, dated April 3, 1954.

The Court: Any objection?

Mr. Krause: Well, not as to the fact that it was written to us and that this is a copy of it. But, as we see it we object to it on the ground that it has no bearing on the case at all. The statute provides for the method under which the United States—and the fact that our office was given sixty days to enter an appearance to this libel I don't think has any bearing on the case one way or the other. So, I object that it is immaterial.

Mr. Williams: Your Honor, it pertains only to the jurisdictional point which was raised by Mr. Krause and we wish to preserve our rights. The exhibit should be in in the event of an appeal or anything like that.

The Court: All right. I will sustain the objection to it but it will be received as your offer.

Mr. Williams: Well, your Honor, I don't understand the objection. It is my understanding of the ruling of Judge McCulloch that the matter did have a bearing on——

The Court: The fact that you wrote a letter to counsel who wasn't a party to it or didn't—if you want to offer evidence as to counsel's reaction to the letter, whether he called you up and said "O.K." or whatever it is, that [283] would be true. But, it is just a self-serving letter.

Mr. Williams: Well, it is involved in another case involving a jurisdictional point, your Honor.

The Court: Well, it will be in the record as your offer of proof.

Mr. Williams: Very well, your Honor.

[See page 458.]

I offer into evidence Exhibit Number 12, United States Coast Guard Rules and Regulations for Cargo, Miscellaneous Vessels.

The Court: I beg your pardon, I didn't catch that.

Mr. Williams: That is Exhibit Number 12, your Honor.

The Court: Thank you. I have it now. Any objection?

Mr. Krause: Well, your Honor, I would like to know, it is quite a book. I would like to know what rules are being offered in evidence and their pertinency to the issues.

The Court: Are you in a position to advise counsel?

Mr. Williams: Yes. If you will hand it to me. I think it is Rule 97.27-1-A.

The Court: 97.2—

Mr. Williams: 27, your Honor, -1 sub A.

The Court: Sub A. Thank you. Page 69.

Mr. Williams: And, the following section, 97.27-5, sub A.

Would you like to see it, Mr. Krause?

Mr. Krause: Well, I will offer an objection to it, [284] your Honor, on the grounds that they have nothing to do with the vessel at anchor. Those are the rules for navigation and have nothing to do with this case of a vessel anchored, and they don't have

any bearing upon the issues of this case in any event.

Mr. Williams: Your Honor should perhaps see them.

The Court: Yes. Will you please let me have them and then I will hear from you whatever your claim for it is.

Mr. Williams: We don't feel that they are limited to vessels under way at all. It doesn't say anything about under way. I feel it covers all vessels at anchor or otherwise.

The Court: "All ocean and coast-wise vessels shall have a lookout at all times at or near the bow during the nighttime." Now, it is your position that that is effective when a ship is at anchor in a harbor?

Mr. Williams: Yes. The words "at all times," I feel means what it says and I can find no other language which is limited to ships under way. I have just read through those matters, generally, and I don't find—I don't know reasons why it doesn't. I didn't get the impression—it never occurred to me until Mr. Krause made the objection.

The Court: What would be the proximate cause of having a lookout at or near the bow in this connection?

Mr. Williams: Very definitely this, your Honor: He [285] could have observed the existence of the liberty boat and could have also—could have, therefore, been at the rail to assist the liberty party coming aboard and to supervise them coming aboard.



The Court: The testimony is that that is the deck officer's obligation.

Mr. Williams: Well, a lookout could inform the deck officer. That would be the purpose of it. The deck officer could not be every place in the ship at once and that would be why he would be there, be informed as to all activity.

The Court: Would you maintain that when a ship was moored to a dock that you would have to have a lookout on the bow?

Mr. Williams: You would have to have a lookout on the dock.

The Court: At or near the bow?

Mr. Williams: Yes.

The Court: Well, I guess——

Mr. Williams: I don't feel that I am required to maintain it, your Honor. The Coast Guard does.

The Court: Well, I understand that. But, I am not at this moment going to take the time to read this whole book to ascertain when these rules apply. And, I am going to have to rely on the statements of counsel at the moment. But, I am just amazed that that would be a rule. [286]

Mr. Williams: Your Honor has heard testimony to the effect that it is quite customary to have a gangplank watch out, anything of that nature, particularly at the dock to prevent improper boarding, unauthorized personnel, improper cargo, and things of that nature. Whether that lookout would comply with being at or near the bow, I don't know. It would depend on where the gangplank went down. If the Court wishes to reserve ruling on it till a

later date I am not going to offer any testimony at this time in connection with it.

The Court: There is nothing in this sub-part "shall exonerate any master or officer in command from the consequences of any negligence to keep a proper lookout or to maintain a proper fire watch or for any negligence in any precaution that would be required for the ordinary practice of seamen or by the special circumstances of the case. When circumstances require it additional watch shall be maintained to guard against fire or other dangers and to give an alarm in case of action under the statute." It seems to me that that is nothing more than just an ordinary due caution.

Mr. Williams: I think it merely states that all the regulations pertaining to what is good seamanship or good care are not contained in the book.

The Court: Well, until I am better advised I will reserve my ruling on it.

Mr. Williams: Very well, your Honor. [287]

The Court: Now, my notes do not disclose the admission or receipt of Exhibit 9, the medical bills of libelant.

Mr. Williams: Oh. I think they are all in, are they not? I believe they are all in and Mr. Krause stipulated that the persons would testify that those were reasonable if they were called.

The Court: Yes. But, you recall the Court ruled there was no testimony as to reasonable necessity of all of them.

Mr. Williams: I am sorry. I will offer them at this time, your Honor.

Mr. Krause: Well, I will withdraw any objection on that ground, your Honor. I think the testimony of the Doctor discloses their necessity.

The Court: Very well. They will be received.

(Whereupon medical bills of libelant previously marked as Exhibit Number 9 for identification were thereupon received in evidence.)

Mr. Williams: I believe all our listed exhibits are now in, your Honor, with the exception of Number 3 and Number 8 which the Court has.

The Court: Number 12?

Mr. Williams: Number 12 is under advisement. Number 8, as I understand, the Court——

The Court: Sustained. That is what my records show. [288]

Is that your case?

Mr. Williams: Yes, that is our case, your Honor.

The Court: Well, Mr. Krause, it is only four or five minutes before 5:00. Is there any reason why we can't start at 9:30 in the morning?

Mr. Krause: We can, your Honor.

The Court: All right. 9:30 tomorrow morning.

(Whereupon the Court adjourned for the day, July 28, 1955.) [289]

### Morning Session

(Court reconvened at 9:30. July 29, 1955, pursuant to recess.)

The Court: Defendant's first witness.

Mr. Krause: We will call Captain Hazelwood.

## JAMES A. HAZELWOOD

produced as a witness on behalf of the respondent, being first duly sworn by the Clerk, was examined, and testified as follows:

## Direct Examination

Q. (By Mr. Krause): Your name is James A. Hazelwood? A. Yes, sir.

Q. What is your profession or occupation?

A. I am a marine superintendent for Luckenbach Steamship Company.

Q. Your profession generally is that of a seaman? A. Yes, sir.

Q. When did you start going to sea?

A. Well, I was raised on the water. I started quite early. I started to go to sea on outside ships about 1913.

Q. What sort of a license do you hold?

A. I hold a master's unlimited license and several pilot's.

Q. How long have you held your master's license unlimited? A. Since 1923. [290]

Q. How long did you sail under that master's license?

A. I sailed as master about twelve years.

Q. Now, at the present time you are a marine superintendent for the Luckenbach Steamship Company here in Portland? A. Yes.

Q. What are your duties with respect to ships?

A. Well, my duties is the operating part of the ships, see? Cruise ships and operating of the ships in general and also I run the stevedore company.



(Testimony of James A. Hazelwood.)

Q. Are you familiar with the duties of the various licensed officers on board merchant vessels, Captain?      A. I am.

Q. Particularly with the duties of second assistant engineers?      A. Yes.

Q. Now, what are the duties of second assistant engineer outside if there are any outside of his immediate work in the engine room?

A. Well, the second assistant, as far as his duties is concerned, outside of the engine room he don't have any. But, I think it is the duty of any officer of the ship including the second assistant engineer if he sees anyone or any part of—any danger to anyone on the ship, the ship itself, he certainly should interfere and try to correct it.

Q. Well, who are these people on the vessel that carry out the owner's obligations when the vessel is away from under [291] the control of the owner?

A. Well, the licensed personnel on the ship.

Q. Now, these licenses, who are they issued by?

A. They are issued by the department of—well, not the—it is the Coast Guard now. It used to be the Department of Commerce. Now it is the Coast Guard. U. S. Coast Guard.

Q. Are there examinations given before the licenses are issued?      A. Yes.

Q. Do those examinations—what is the purpose of the examination?

A. Well, it is to arrive at the ability of a man to perform the duties in which he is applying the examination for.

(Testimony of James A. Hazelwood.)

Q. Then, these licenses are issued for periods of how long?      A. Five years.

Q. Five years?

A. Well, if he has—goes and gets his license. But, the period that he sails on that particular license for is five years. But, he can get the raise of grade during that time if he has served his time under that license in that capacity or the capacity of a lower grade with a higher license.

Q. Yes. So, after a person has his second assistant's license he can, after sailing under that license during that five-year period, come up for his next license?

A. Well, he don't have to sail five years. I think he [292] sails one year on that and two years as third assistant. That is to the best of my judgment.

Q. Well, that is enough service. But, he has to take an examination for the next rate?

A. Yes. That's right.

Q. Does the second assistant engineer stand a watch in the engine room when there is no other engineer officer there at the time?

A. That's right.

Q. That is, does the second assistant engineer have complete charge of the engine room during the time that he is on watch?

A. Four hours and then he has eight off.

Q. Now, Captain, what duty, if any, does the second assistant engineer have if he sees a member of the crew not on his watch or not even in his department doing something that he knows is hazard-

(Testimony of James A. Hazelwood.)

ous and likely to produce injury to himself or to others?

A. Well, I certainly think it is his duty as an officer of the ship—as an officer of the ship and also a humane act to tell the man that he is doing something that he shouldn't do, to keep him out of trouble, or keep some of the other crew members out of trouble.

Q. Well, we are concerned particularly with whether there is a duty. While anyone has some moral obligations toward others, we are concerned here with whether or not licensed [293] officers have a duty under those circumstances.

A. Well, they do have a duty. And, I see it happen on our ships quite often that men that are not directly connected with that department will warn people or tell people not to do things in which they shouldn't do.

Q. By the way, I would like to have you just explain generally what a pilot ladder or Jacob's ladder is?

A. Well, we usually call a pilot ladder or ladder, that is, these—something like that (demonstrating) the size of it with a rope around it and they have sometimes a solid foothold and sometimes a round, two rounds. That's what they call a pilot ladder. A Jacob's ladder—what we used to call a Jacob's ladder is what a sailor uses for painting over the side. It's just a rope ladder with one spindle to it and the men usually climb that by getting over one side of it so they can keep it away from the

(Testimony of James A. Hazelwood.)

side of the ship so they can get their toes between the sides of the ship. What we usually—a Jacob's ladder, the steps are wide enough so that they don't have to hold it away from the ship. They usually grab it by the sides coming up—not by the steps, but by the—on the side of the ladder because there is space enough between to get your hands between the side of the ladder and the side of the ship.

Q. Well, the description of this ladder apparently is of the ladder type? [294]

A. That's right.

Q. That is, it had oblong pieces on the end?

A. Yes. And, they are gouged out where the rope fits into these pieces.

Q. Yes. The edges are gouged out and the rope lays—— A. Right.

Q. ——in the gouge? A. That's right.

Q. Then, are they seized up at the top and at the bottom of each one of these?

A. They are seized in between the steps so it will hang on. The rope will stay in that way.

Q. This one was described as having two regular rounds. A. That's the usual.

Q. That is the usual type?

A. That's the usual pilot ladder, yes.

Q. Now, if that is in good condition, Captain, is that a safe method for crew members to board and leave the ship? A. Well, it's at anchor?

Mr. Williams: I object to that, Your Honor. My objection is that our contention is that we do not contend that it is not safe at all but it is unsafe



(Testimony of James A. Hazelwood.)

under the particular circumstances herein contained, the night, the light, the fact that there was no watch above, and the further fact that it is the entire crew returning from shore liberty. [295]

The Court: Yes. I think the witness is entitled to have the entire factual situation just as the respondent asked of libelant under the conditions.

Mr. Krause: Yes, Your Honor.

Q. Captain, assuming that this vessel was lying at anchor in the harbor of Sasebo, Japan, are you acquainted with that harbor? A. Yes.

Q. And, it was a liberty ship—— A. Yes.

Q. ——this ship was at the time discharging piling and bridge timbers with Japanese Longshoremen from the deck into the water; the occurrence was at about 12:40—between 12:40 and 1:00 A.M. in the month of April; there were two floodlights attached to the boat deck that were trained down onto the ladder, and the steps of the ladder were clearly visible when persons were walking or climbing; a portion of the crew of the vessel including the second assistant engineer had been ashore, having gone ashore in a launch furnished by the vessel's owner, and returned after midnight; and it was estimated that there were from ten to fifteen members of the crew on the launch; the launch was 25 to 30 feet in length and from six to seven to twelve feet in breadth or beam. Now, Captain, under those circumstances what can you tell us as to whether or not a Jacob's ladder of the kind described here is safe?

Mr. Williams: I have an objection, Your Honor.

(Testimony of James A. Hazelwood.)

Counsel states it was an assumed fact that the ship was discharging cargo. The log shows clearly that it was not at the time of the injury and there has been no testimony to indicate that any cargo was being discharged at that time. The log shows that it had been finished well prior to the——

The Court: Counsel can assume any facts he desires in his hypothetical.

Mr. Williams: It is my understanding, Your Honor, that they have to be facts that are in evidence.

The Court: Well, it all depends which comes first the horse or the cart. In order to make his hypothetical be of any weight he has to supply those facts. But, he may start out with any assumption he desires.

Mr. Krause: May I have the log, please?

The Court: Yes, you may.

Mr. Krause: Your Honor, the log indicates that the discharging was completed about 10:30. Well, there is testimony in some of the depositions that they were discharging. And, I am going to eliminate that, however, and rely upon the log for accuracy.

The Court: Very well.

Q. (By Mr. Krause): Captain, just disregard the fact that any discharging was being done at the time and that discharging had been completed about 10:30 that night. Now, what [297] can you tell us as to the safety of the use of such a Jacob's ladder as has been described here for the members of the crew to board the vessel?

(Testimony of James A. Hazelwood.)

A. Well, I think it is immaterial whether the cargo is being unloaded or not because pilot ladders are being used continuously by boarding crews and other people coming aboard the ships. And, I have never heard any question about the safety of using a pilot ladder if the ship is at anchor for the ship's crew.

Mr. Williams: I move that that portion of the witness' answer covering what he has heard——

The Witness: Well, what I have seen.

The Court: Just a moment. There is a great deal of expert testimony that is based upon hearsay. That is the only way experts get their information is by reading books and studying. Well, that doesn't develop an objection.

Mr. Williams: Can he offer testimony, Your Honor, what he has heard from somebody sometime or some place?

The Court: That is the whole basis of an expert. How does an expert obtain knowledge except through hearsay?

Mr. Williams: We assume he obtains some from experience.

The Court: That is the big distinction. But, I will hear you on any other grounds.

Mr. Williams: Well, I further move to strike his answer [298] as not being responsive to the question.

The Court: Well, now, very well.

(Last question and answer read by the Court Reporter.)

(Testimony of James A. Hazelwood.)

The Court: All right. I will leave the answer in.

Q. (By Mr. Krause): Now, Captain, what is your own opinion then as to the safety of this pilot ladder for that purpose?

A. Well, I think the pilot ladder is certainly safe because we are using it every day in such manners.

Q. Now, for how many years have you, being in charge of vessels yourself, used and seen these pilot ladders such as the one described used?

A. Well, I have seen them continuously. All of my time and experience with ships I have seen this type of ladder. It's been improved a lot, it is better now than it was a few years ago, but this type of ladder has been used to my knowledge ever since I have had anything to do with ships.

Q. Now, what equipment on the vessels is used regularly for the purpose of putting men over the side to staging while painting?

A. Well, it's usually not as good a ladder as this pilot ladder. They use what we call a Jacob's ladder.

Q. And that is the type you have described before?      A. That's right.

Q. Just the ropes with a round put in between?

A. That's right.

Q. Now, what sort of ladder is used by the pilots and health inspection officers and the immigration officers when vessels are coming off a foreign voyage?

A. Well, in all American ports, to my knowledge, they use this pilot ladder. Now, the only place



(Testimony of James A. Hazelwood.)

I know that don't use them is some of the Central American ports and not—that is not because it's unsafe, it is because they come aboard dressed up in white uniforms with everything on them and they require a little bit of better attention to climb aboard in order not to get their white uniforms dirty.

Q. Now, when vessels are in the Portland harbor and in other harbors where the water is quiet, what method is used for getting down onto barges and log rafts and so on?

A. We use the pilot—the regular pilot ladder.

Q. And, are those pilot ladders in continuous use daily here in the port of Portland?

A. They are.

Q. Are they used in the nighttime for the same purpose? A. Yes.

Q. Now, Captain, can you tell us whether there is any danger in a man climbing a pilot ladder of the kind described here when he has his hands encumbered and, particularly, by carrying a bottle of whisky under the left arm and holding one in his right hand by the neck and attempting to [300] climb the ladder in that fashion?

A. Well, he certainly does endanger himself and anyone that is anywhere in his vicinity by doing such an act. It's an unsafe act all the way.

Q. Are there any, based upon your years of experience on a vessel, rules regarding standing under loads, standing under ladders, while men are ascending them aboard American merchant ships?

(Testimony of James A. Hazelwood.)

A. Well, I don't know as there is any rule but it certainly is a practice that people don't stand under ladders when other people are climbing them with packages—particular packages in their hand.

Q. In connection with the loading of cargo, for example, and bringing in of loads, what is the practice with regard to standing under them?

A. Well, the men are not supposed to and they don't, to my knowledge. The winch driver in taking the loads, he sings out to the men to stand clear and they usually stand clear. And, no one is supposed to be on a ladder going up or down the hatch when there is a load swinging over the hatch. That is a standing rule all along the water front.

Q. Are there other straight-up-and-down ladders on the ordinary liberty ship other than the pilot ladder that may be thrown over the side?

A. Yes. All the hatches have up-and-down ladders and [301] the men climb the masts, there is up-and-down ladders there for them to use. And, on this liberty ship from the forward end of the house it also has an up-and-down ladder that you go up from the main deck to the boat deck.

Q. Those straight-up-and-down ladders are constructed of what and how?

A. Well, they're steel. Steel ladders.

Q. Steel side pieces?

A. Yes; and steel rungs.

Q. And steel rungs? A. Yes.

Q. Is there more than one rung in those ladders?

(Testimony of James A. Hazelwood.)

A. Oh, no. There are several rungs. I think the rungs are about a foot apart.

Q. I mean, for each step?

A. Some of them have more than one but lots of them have only one rung. The ladders going down the hatches all have one rung.

Q. Are the ladders straight up and down in the engine room of the liberty vessels?

A. Well, they are not exactly straight up and down but it's a small angle. But, usually they go down sideways. Or, some people—I don't go down sideways but a lot of people go down backwards when they go down a ladder. But, there are two: some of them are separate and some of them have two pieces for the ladders. [302] Have two pieces for the ladders.

Q. Some have solid steps and some have two rungs? A. Yes.

Mr. Krause: You may cross-examine.

### Cross Examination

Q. (By Mr. Williams): Captain, you are the marine superintendent for Luckenbach Steamship here in Portland now? A. Yes.

Q. Your job is a supervisory one. Are you still taking ships out? A. No.

Q. You aren't doing that? A. No.

Q. How long has it been since you took your last ship out? A. Oh, about seven years.

Q. When a master and a crew sign shipping articles who signs as representative of the owner?

(Testimony of James A. Hazelwood.)

A. Well, I don't know as there is any rule but it certainly is a practice that people don't stand under ladders when other people are climbing them with packages—particular packages in their hand.

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Q. How long has it been since you took your last ship out? A. Oh, about seven years.

Q. When a master and a crew sign shipping articles who signs as representative of the owner?

(Testimony of James A. Hazelwood.)

A. All members of the crew sign Articles on the space preserved for them and the Master signs the Articles as a representative of the ship owner.

Q. Actually, the Articles are a contract between the captain representing the ship and the men as employees?      A. That's right.

Q. Captain, you say you are using the Jacob's ladder [303] every day?      A. That's right.

Q. You mean for longshoremen getting down to barges and various things like that?

A. Longshoremen, sailors, whoever have to go over the side. I use it myself. I climb up and down it myself.

Q. This is during regular duty hours?

A. Yes. Well, our duty hours are 24 hours a day, you know, so it don't mean whether it's day or night, we still climb the ladder.

Q. I realize that, Captain. You were performing functions aboard the ship?

A. That's right.

Q. Are these ships that are being unloaded, most of them are alongside docks, aren't they?

A. That's right.

Q. There is a regular gangway there provided for persons to walk right onto the deck of the ship?

A. That's right.

Q. And sailors going on shore liberty would use the gangway, would they not?

A. They would use the gangway.

Q. And, immigration officials, pilots, doctors, people of that category that you have spoke of often

(Testimony of James A. Hazelwood.)

coming aboard on the Jacob's ladder, they are on business, are they not? [304]

A. That's right.

Q. And, they're usually not doing any drinking or anything like that when they're coming aboard, are they?

A. No, they're not. And, the law is very specific in the rules of—that the men shall not bring whisky on board the ship or come aboard the ship under the influence of liquor.

Q. Captain, do you recall whether it says what you say it says or whether it simply requires that grog shall not be brought aboard?

A. Well, you can use whatever word you want, it means the same thing.

Q. But, the individuals you speak of that are using the Jacob's ladder every day, they're using it for regular duty functions of the ship or going aboard the ship for various specific purposes, aren't they?

A. Well, I said that the crew uses it for the same use it was being used at this time. Certainly, people that use it, they wouldn't be climbing up the Jacob's ladder to get aboard the ship unless they were members of the crew of the ship or they had some business there. They wouldn't just use that for a form of exercise.

Q. What I am getting at, you're not testifying that Jacob ladders are being used in this harbor for a crew to go ashore, or anything like that, are you?

A. Well, when the ship anchors—and, some-

(Testimony of James A. Hazelwood.)

times I do anchor down off of Swan Island there—and there is a Jacob's ladder used for the men to go to and from the ship.

Q. What ship?

A. Whenever a ship is laying at anchor in this harbor, to my knowledge, they—the crew goes ashore on the Jacob's ladder.

Q. They don't use the accommodation ladder?

A. Very seldom. When a ship is laying in the harbor they don't use the accommodation ladder.

Q. They don't use it at all?

A. That's right.

Q. What is it used for?

A. Well, an accommodation ladder is a very dangerous device when laying in a harbor or laying in the harbor because these small boats get caught under it.

Q. What about a harbor where the water is smooth?

A. Also I would rather use any time—and most ships would rather use—a pilot ladder than they would an accommodation ladder because you have got that platform at the bottom and the men have to step—they—if the ladder is down for enough so they can come around, the men have got to step around this ladder or step on a platform.

Q. Well, Captain, can't that platform be very easily adjusted [306] by the boat personnel from up above to regulate it at any convenient height for the boat?

A. Then they would either have to step down or



(Testimony of James A. Hazelwood.)

step up if you put it lower or raised it. Now, using a pilot's ladder coming aboard the ship it's a rule and a safe rule that somebody get over the ladder and pull it on board the boat so as it's not down between the side of the ship and the launch that is coming alongside. That is the safe method of using a pilot ladder, is to get it aboard the small boat that's there so it don't hang down or get crushed and somebody step off on it and he go below.

Q. Well, then, somebody has to hold it onto the small boat, hold the tail of it while the other men start off?

A. No, he doesn't especially have to hold it, he can just pull it on board, see?

Q. I see.

A. But, keep clear of it. It's a standard practice to keep clear of a pilot ladder.

Q. I didn't ask you that question, Captain, but perhaps I will in a moment. But, you say it's a practice to pull this Jacob's ladder aboard the liberty launch. Then, when the first man steps on it wouldn't it fall down in between the——

A. Well, the proper way to rig this ladder which is not always done, maybe, is to be sure that the ladder don't [307] come down far enough so it's below the boat, see? But, if it is it's a rule before I get on a ladder I would be sure that that ladder was clear. And, if there was a little bit of it I'd have it on the boat so when I—when I stepped on it I—it would be clear, I wouldn't be getting hung up some way.

(Testimony of James A. Hazelwood.)

Q. A liberty launch doesn't fasten onto the ship when she is there, it just lays alongside?

A. As a rule they put a rope from the boat. They throw a line aboard the ship.

Q. Way up over the deck?

A. Up to — not always but that would be the proper procedure.

Q. Yes. Captain, you mentioned that you have seen men come aboard on Jacob's ladders. What about the packages, how do they get them aboard?

A. Well, I—I, in my experience, I have seen people climb up a ladder with packages but it's certainly not the thing to do. But, most people, when a liberty party comes alongside, the party not having packages comes up above and throws down a heaving line usually—heaving line or—he throws down a heaving line and these packages are tied onto it and brought on board by one of the members of the crew that is in the party.

Q. Wouldn't that be done by somebody that is on gangway [308] watch up above?

A. Well, not always. Not always. We have a very funny deal today, you know? You'll see some guy say, "How about getting my packages up?" And he wasn't a friendly guy, the guy up above would say, "Come up and get them up yourself." Well, it would be the friend of somebody in the liberty party that climbed up the ladder first and then he'd pass a rope down for his friend to bring his packages up.

(Testimony of James A. Hazelwood.)

Q. Captain, you are steadily employed by Luckenbach? A. Yes, sir. That's right.

Q. Right now? A. That's right.

Q. And, did you take ships for them prior to that time?

A. No. I worked for Martin-Hawaiian Steamship Company all the time for 33 years except the time out in the Service. I worked for American-Hawaiian Steamship Company and I was working for American-Luckenbach — American-Hawaiian. I still get mixed up.

Q. The ladders that go up the hatchways those are used by sailors, primarily, longshoremen?

A. Longshoremen and sailors.

Q. They're not used by stewards, are they?

A. No, not ordinarily. Maybe one of them goes down once in a while but he has got no business down there. [309]

Q. The ladders that go up the mast, they wouldn't be used by the stewards? A. No.

Q. Captain, is a Jacob's ladder a safe thing—appliance to be used by a person who is inexperienced in the use of it and who hasn't been up one before? A. I——

Q. Or is there a little trick to it?

A. No, I don't think there is any particular trick to it, if a man has got use of both hands. And, you see some men go up a ladder and some of them will go right up and some of them will hang onto it like they're in love with it, hold on with both arms. I saw longshoremen going down the hatch the

(Testimony of James A. Hazelwood.)

other day and I asked a fellow, "Is he a new man or has he been around a long time? The way he is going down that ladder I don't think he has ever done it before." And this fellow says, "He's an old timer but he is just a little nervous, that's all."

Q. If there is a dangerous point in the ladder where would you say it would be, first getting on or just as you are getting off or halfway up or——

A. Well, if there is still water there is no dangerous points. If the water is rough there is dangerous points. Because, the proper way to get on a ladder is to watch your point, when your boat comes up step then. If you get [310] on it lower down, when she comes up she will catch you. But, the proper way to get on this ladder is watch your boat. Sometimes these fellows—the very fellow you are talking about — these fellows are climbing, they're going up and down, I always instruct the men, "Now, watch it when you come up. Jump the ladder so when the boat goes down you will get clear."

Q. You generally give the stewards some sort of instructions?

A. Well, I give anybody who—whether it's a steward—if I am on a boat if I have never seen the man before I think it's only my duty if I can see that it's not a person who is accustomed, well, I will say to him "Now, here, you better watch yourself because this is dangerous procedure."

Q. You will generally give men that are new to you some instructions on that?



(Testimony of James A. Hazelwood.)

A. Well, I do.

Q. Yes. Now, Captain, what I was wondering is this: When a man climbs the ladder and the ladder goes over the rail, over the main deck rail, we will say, or some place else into the boat, when he is climbing over that rail does he have a problem then with where to put his hands and how to get off?

A. Well, as usual these ladders are made fast over a pipe rail or something where he steps on that rail before he goes [311] over the side, see? He don't just climb all the way up. When he gets up to this rail on the pipe rail or some of the bulwark he will—it's usually made fast some way. It's got to be because—some place to make it fast. Now, I don't know just how this ladder was made fast but if it was somewhere around where he could get his hands over something and climb over that is not too good a place to get over and, naturally, unless there is something to get hold of there——

Q. But, I mean, the ladder is ending and going over the rail.

A. That's right.

Q. And you were getting up, you bring your feet up but there isn't anything there for your hands, you have got to get in a crouch or something, don't you?

A. Yes.

Q. To kind of get over?

A. I don't think—I think getting on a ladder any time from a boat is just about as bad a place if it is any bad place in it as getting over the rail.

Q. Of course, in smooth water you wouldn't have the trouble then, would you?

A. No.

(Testimony of James A. Hazelwood.)

Q. Where do you normally rig a ladder on a—let's say on a liberty ship? You said you were providing for crew [312] liberty?

A. Well, as a rule the ladder or pilot ladder is used usually. Now, I don't know whether this one—it's just rigged fore of the house because that is the best place. That is the clearest place to get aboard the ship.

Q. Where is it rigged then, the main deck, you say? A. On the main deck.

Q. That is where most of the crew would be getting on and off, isn't it? A. That's right.

Q. But, suppose it was rigged up to the boat deck up above there and——

A. Well, that's rarely—I don't know how this—but, that's nothing wrong. The men can just go all the way up and then step off onto the house. That would be just as good a way to rig it from the boat deck.

Q. Yes?

A. Because then the men could climb all the way up, he could just climb up until he—and then step off on the main deck.

Q. Oh. Then, he would step around the edge of the ladder?

A. That's right, under it. Right under the house. He could still hang onto the ladder and then he would have a good hand hold to grab onto.

Q. What would he hang onto? [313]

A. Hang onto the ladder until he got stepped around there.

(Testimony of James A. Hazelwood.)

Q. He would have to step around it?

A. He would have to step around it all right.

Q. Suppose his hands were encumbered at that point, would that be pretty dangerous?

A. Well, he shouldn't have anything in his hands when he does it.

Q. Well, just at that point it would become extremely dangerous if the hands were encumbered?

A. Well, it certainly would be.

Q. You would instruct your men not to do that?

A. I sure would.

Q. Yes. In giving them a little instruction or training on the use of the Jacob ladder would you tell them that they should climb with both hands free, is that the correct thing——

A. Certainly do.

Q. ——to tell them?

Mr. Williams: No further questions.

Mr. Krause: I have nothing further.

The Court: Captain, it is the contention of the Libelant in this matter that the Respondent was negligent in one particular in rigging the pilot ladder to the boat deck rather than to the main deck. Now, with the information [314] that you have in the questions presented here and the testimony that you have given, what would have been the method of a seaman getting off of the ladder and getting onto the main deck if the ladder had been rigged to the main deck, the top of the bulwark, or railing, whatever it might have been there?

The Witness: Well, if it had been on the rail-

(Testimony of James A. Hazelwood.)

ing, if it—now, these liberty ships, they have—their bulwark are solid.

The Court: About four feet?

The Witness: But, if it had been rigged to the main deck it would probably have been rigged by the—at the corner of the house where he could have put his arm around it, the support, the upright, from the main deck at the bridge there, see? But, if it was rigged on the boat deck and he wanted to get off on the main deck there is nothing wrong with that. He just steps around and he puts his arm through the ladder until he gets down on deck.

The Court: Wouldn't one have been more difficult than the other?

The Witness: I don't think so.

Mr. Williams: I have just another question in line with that.

Cross Examination—(Continued)

Q. (By Mr. Williams): There are many places along the side there of the [315] house section where there are no supports to hang onto, are there not? I mean, these supports are spaced at intervals, are they not? A. That's right.

Q. It would depend on where this particular ladder was placed as to whether or not he had anything to hold onto?

A. Yes. Unless he hangs onto the ladder and went over the side. I can't imagine there not being something there, either the halyard on deck where they tie the ship up or a box or something for a man to step off the rail for him.



(Testimony of James A. Hazelwood.)

Q. I mean, for him to hold onto?

A. That's right.

Q. There wouldn't ordinarily be anything there?

A. That's right. Sure.

Q. And, if he is stepping around the side of the Jacob's ladder, it is—it's just fastened on the pipe rail of the boat deck, it would hanging free down there, would it not? A. That's right.

Q. Wouldn't it sway as he stepped around it like that—— A. No.

Q. ——and try to bring his weight off it?

A. Those ladders stay pretty close. That's the reason they are built is to hug the side of the ship. With his weight on it it shouldn't sway around. It would sway a [316] little bit, of course, but I don't think it would be particularly dangerous.

Q. But, it is your testimony that it would be very much so for a man who had his hands encumbered?

A. Well, I don't think a man should have his hands full climbing a ladder any time. I think it is danger put there that shouldn't be there when a man goes on any ladder—I wouldn't climb a ladder at home—when I climb a ladder and want something I usually climb it and let my wife stand on the bottom or pass it up to me or hook up a rope so she can pull it up when I get there. I don't climb with my hands high to start with.

Mr. Williams: Thank you very much, Captain.

The Court: You may step down.

(At this time a recess was taken in the present case and the Court heard *ex parte* matters.)

Mr. Krause: Respondent will call Captain Larson. [317]

### HERMAN H. LARSON

produced as a witness on behalf of the Respondent, being first duly sworn by the Clerk, was examined, and testified as follows:

#### Direct Examination

Q. (By Mr. Krause): Your name is Herman Larson? A. Yes, sir.

Q. Where do you live?

A. At 5026 Northeast 10th Avenue.

Q. What is your profession?

A. I am a ship Master.

Q. How long have you held a Master's license, Captain? A. Since 1931.

Q. How many years have you sailed as a Master of vessels? A. Since 1936.

Q. Since 1936 continuously, or up till what time? A. Continuously.

Q. Continuously?

A. Continuously up to '54. I am sort of semi-retired. I am relief Captain now.

Q. At the present time you are engaged as a relief Captain? A. That's right.

Q. Is that just to relieve some Master for short periods of time? [318]

A. Yes, sir. That's right.

Q. Have you been in the harbor of Sasebo, Japan? A. Yes, sir.

No. 15221

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United States  
Court of Appeals  
for the Ninth Circuit

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JOHN FARLEY, Appellant,  
vs.

UNITED STATES OF AMERICA, Appellee.

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 329 to 654, inclusive)

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Appeals from the United States District Court for the  
District of Oregon

FILED

MAR - 6 1957

PAUL P. O'BRIEN, CLERK





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(Testimony of Herman H. Larson.)

Q. During the greater part of your service as a Master of ocean-going vessels, what service were you in?

A. The Oriental Service principally.

Q. Principally Oriental. Between the Pacific Coast and——

A. The Far East.

Q. ——Japan? The Far East. Are you familiar with the liberty-type vessel?

A. Yes, sir.

Q. Have you commanded liberty vessels?

A. Yes, sir.

Q. Are you familiar, Captain, with the duties of the licensed officers on American vessels?

A. Yes, sir.

Q. Particularly, the duties of a second assistant engineer?

A. I believe—I believe I know the duties of a second engineer.

Q. What duty, if any, does he have with respect to the vessel, her cargo, and the crew, outside of his immediate four hours of duty in the engine room?

A. Well, it is usually accepted that as the licensed officer his duty is at all times on board the vessel to see that the interest of the owner, the vessel itself, is [319] protected, not alone in the handling of the cargo or the vessel itself by the personnel—the crew, in other words, as well.

Q. Well, would those duties extend to members of the crew not in the engine room department?

A. When the occasion requires it it does. If you

(Testimony of Herman H. Larson.)

will permit me I would like to qualify that by saying——

Q. Yes?

A. ——that when you speak of a licensed man you have done accepted him to be of a little superior quality than you would find among the unlicensed in the effect that he has had the experience more so than the unlicensed and, therefore, he would be better qualified to look after the interests of the personnel.

Q. Now, if a second assistant engineer should see a member of the steward's department doing some negligent act or something in a negligent manner that might result in injury to that man does the second assistant have any duty?

A. I believe it is his duty to caution him, to warn him, to try to prevent him from doing anything that would incur an accident.

Q. Now, what would your opinion be in the event this negligent act were apt to result in injury to someone other than the man that is performing the negligent act?

A. It would be the very same. I believe it would be [320] his duty not alone as an officer but as a humane act to try and prevent it by cautioning the man.

Q. What, in your experience, has been the practice in that regard, Captain; that is, what have you observed as to what the second assistant engineer actually does in that situation?

A. Well, in any situation where there is apt to



(Testimony of Herman H. Larson.)

be an injury or an accident to any member of the crew whether it is an officer or an unlicensed member of the crew, merely that he is in a position to observe where an accident might occur, it is up to him to try to prevent it as a humane act, not alone as an officer.

Q. Well, I was trying to get away from what you—the matter of his duty rather than what the actual practice is. Do they do it on the ships today?

A. Well, yes, they do. I might state it this way that I have seen where the engine crew with the second assistant as well as the third assistant have been taking oil on board the ship such as lube oil, particularly, where drums are being taken on board and being handled and there is where accidents might happen unless precaution is used because these oil drums are very heavy. And, in handling these the engineer that works with the oilers and the wipers as the case may be, it is up to him to see that no accidents occur by cautioning the unlicensed personnel [321] in handling these heavy drums. And, I have seen that on many occasions.

The Court: Of course, that is during duty tours?

The Witness: That's during duty.

Mr. Krause: That's the case of where he has the men under his command.

The Witness: That's correct.

Q. (By Mr. Krause): Well, we are concerned with the case of men who are not under the Engineer's command such as members of the steward's department.

(Testimony of Herman H. Larson.)

A. Well, merely the fact that he is an officer in itself would qualify him or should qualify him as a man of more, better experience, and for that reason he would be—it would be his duty to see that the unlicensed personnel or anyone else would not subject themselves to an accident.

Q. Well, let's get your views particularly with respect to this case here. Are you familiar with the ordinary pilot ladder in use on the liberty vessels?

A. Yes, sir.

Q. This one is described particularly as one with rope sides, oblong wood pieces in which the rounds are fastened, then the ropes pass around the oblong pieces in a groove and are seized above and below that piece of sideboard.

A. Yes, sir.

Q. Is that the ordinary type of pilot ladder?

A. That's the standard pilot ladder.

Q. When it is resting against the side of the ship is there a place where a person can take hold of the sides rather than the rounds of the ladder itself?

A. Yes, sir. Between the oval wood pieces as you have described where the Manila rope is seized to there is space for hand holds.

Q. Now, assuming this liberty vessel, the Augustin Daly, was anchored in the harbor of Sasebo where they had been discharging timber and creosoted pilings until about 10:30 on the evening of April 5th; that some of the members of the crew had been on liberty and had gone down the Jacob's ladder, the same one that was involved in this acci-

(Testimony of Herman H. Larson.)

dent, at about 6:00 P.M. in the evening and gone ashore in a launch provided by the vessel; they returned somewhere between 1:40 and 2:00 A.M.—12:40 and 1:00 A.M. on the morning of the 6th of April; the water was smooth, there were two flood-lights or cluster lights trained on the ladder itself and the steps of the ladder were visible to any person climbing the ladder, and this ladder, the Jacob's ladder, was made fast to the boat deck and then ran down to somewhere near the water's edge. Now, the crew returning from shore leave used that ladder in going aboard a vessel. What can you say about whether or not that is a safe method for the crew to get aboard under [323] those circumstances?

A. Yes, I would say it is a safe method. And, it is common practice and has been for many years. In fact, as long as I have been Master I can't recall where it has not been used.

Q. Aside from being used for the crew in going aboard and leaving the vessel, in what other circumstances is the Jacob's ladder used?

A. Well, it is used when—upon entering a port particularly on the Pacific Coast or in many of the foreign ports. The port officials, immigration, customs, and the Public Health Service boards the vessel by the pilot ladder. It is done right here in Portland. When the vessel enters the port of Portland in many cases they anchor below Terminal Number Four awaiting the port officials before they can dock. They will only dock when they receive

(Testimony of Herman H. Larson.)

permission from the port officials before quarantine—in other words, pratique is granted.

Q. In connection with any work done aboard the vessel, is the pilot ladder regularly used?

A. Yes, the pilot ladder is.

Q. In what kind of work?

A. Well, if a vessel is discharging timbers, those Jap squares, as we call them, bridge timbers, in other words, why they're rafted and raft men have to get down [324] on these rafts and they go down on a pilot ladder. And, if they're discharging cargo on barges the pilot ladder is also used. In other words, the stevedores, they enter the vessel and leave the vessel by the pilot ladder.

Q. Is it necessary to work from staging over the side of these vessels at times?

A. For the ship's crew, yes.

Q. What do they do over the side on the staging?

A. They chip and they paint.

Q. How do they get from the deck of the vessel to the staging?

A. By use of a pilot ladder or Jacob's ladder. Jacob's ladder is principally used then. There is a difference between the Jacob's ladder and a pilot ladder. A Jacob's ladder has one—one line—one rope, generally a three-inch line and a rung is inserted in the lay of the rope at regular intervals, regular steps. That is a Jacob's ladder. A pilot ladder is as you have described it previously two ropes with two rungs——



(Testimony of Herman H. Larson.)

Q. The Jacob's ladder has only one round in it in the step then?      A. That's correct.

Q. But do they sometimes use pilot and Jacob's ladder interchangeably for this type of ladder that we are describing here. [325]

A. Well, the Jacob's ladder I have never seen used for the crew to——

Q. To board?

A. ——to board the vessel, no.

Q. All right. That's only——

A. I have never seen that. We at all times use the pilot ladder.

Q. Captain, are there any rules aboard ship regarding standing under ladders while other men are going up the ladder?

A. Well, that is, you might say, an unwritten law that you gain by experience is not to stand under any objects above your head for fear that some accident may happen, whether it be a load of lumber or piece of machinery or human being or anything else.

Q. Well, what is the usual practice aboard ship about men that are waiting to climb a ladder while another man is going up?

A. Well, they're being cautioned constantly against that. You will find that particularly with the ship's crew when they're working aloft which oftentimes they are and men below are being cautioned to keep from under.

Q. Well, that is the instruction you give them. But, what do you observe as a general practice, do

(Testimony of Herman H. Larson.)

men stand out from under or do they stand at [326] the foot of a ladder when other men are going up?

A. Well, I would say this: men that are familiar with life and work aboard ship, very few, if any, that I can recall need to be told because their experience tells them not to do that.

Q. Now, is it a dangerous thing for a man to climb the pilot ladder with his hands encumbered particularly by having a bottle of whisky under the left arm and a bottle of whisky by the neck of the bottle in the right hand?

A. Well, it is certainly dangerous and very dangerous for a man to attempt to climb it by the ladder when he hasn't got his two hands free.

Q. By the way, Captain, have you recently climbed a pilot's ladder? A. Oh, yes. Yes.

Q. Would you tell the Court just how exhausting it is to climb eighteen or twenty feet up a pilot ladder?

A. Well, I don't know how to describe that any more than to say I am sixty-eight years old, going on sixty-nine, and I find no handicap in doing it. I have done it many, many times and can still do it.

Q. Do you see men in ordinary good health puffing and out of breath when they have climbed eighteen feet up a pilot ladder?

A. I don't think so. [327]

Q. Are you out of breath and puffing when you have climbed that far on a pilot ladder?

A. I don't find it any great exertion.

Q. Now, when the second assistant engineer has

(Testimony of Herman H. Larson.)

been on shore leave and is in the launch that I described to you here before at the foot of this pilot's ladder and a member of the steward's department is going up this ladder encumbered with two bottles of whisky as I have described, is there any duty on the second assistant engineer?

Mr. Williams: Objected to, Your Honor. First of all, he has assumed a fact which is not an issue, the second assistant engineer being under the, he said, at the foot of the ladder. All of the testimony and all of the evidence is to the contrary. And, I feel that you cannot take a hypothetical like that and ask the witness based on no facts.

The Court: Well, I agree with you on that. When one party's position is stated as much as the position has been here and any evidence to the contrary of that would be contradictory of the party's own case, I agree with you on that, to distinguish there not being any evidence, any particular state of the trial, if you understand what I mean.

Mr. Williams: Yes.

The Court: Now, it may be a quarrel of words, too. So that there would not be any understanding, Mr. Krause, I would suggest that you give the witness the benefit of the doubt of the estimate of distances from the ladder.

Mr. Williams: I have a further objection, your Honor. Counsel does not state the existence of knowledge or lack of knowledge on the part of the second assistant engineer standing down there. I feel that the witness cannot make——

(Testimony of Herman H. Larson.)

The Court: The Court has already ruled on that.

Mr. Williams: All right.

The Court: If you will supply in your question the contention of knowledge, if any, that the libellant had, I think that will clear it up.

Mr. Krause: Your Honor, I have been proceeding upon the theory that a man knows and sees what he ought to see.

The Court: Well, has this witness been advised? Of course, he has been here in the courtroom, I understand that, but I don't think your record shows it as to what the situation was.

Mr. Krause: Yes. As far as our position is concerned, it doesn't make a particle of difference whether Farley saw this or not. It is a question of whether he ought to have seen it standing four or five feet from the ladder. And, we have the cases. I will cite your Honor the cases [329] on that and it is the same rule that we have in the state courts. A person——

The Court: I quite agree with you, Mr. Krause.

Mr. Krause: Yes.

The Court: But, I think the objection is technical.

Mr. Krause: I would like——

The Court: If you want to state for the record and let the record show that this witness has been sitting here in the courtroom and has heard all this testimony that has been produced, why, then, the record will show he knows what the factual situation is.



(Testimony of Herman H. Larson.)

Q. (By Mr. Krause): Captain, in my question I said "standing at the foot of the ladder." He was standing between four and five feet from the foot of the ladder and awaiting there for his turn to go up the ladder. Now, what, if any, duties does the second assistant have with respect to warning the man going up the ladder?

Mr. Williams: Objected to, your Honor. It is the same facts. He has not—my understanding is that the Court has ruled that the witness must be given in the hypothetical the element either of notice or lack of it. I mean, whether he knows.

The Court: Or the opportunity of whether or not he should have known. I agree with counsel that a person is charged with knowing what he should have seen, what [330] an ordinarily prudent person would have seen.

Mr. Williams: Yes.

The Court: On the other hand, I am not so sure if this witness knows what the attending circumstances are concerned. As far as the record is concerned this witness doesn't know if it is daytime, nighttime, or what it is.

Mr. Krause: I thought I had stated all that a little earlier, your Honor.

The Court: If I am in error there, Mr. Krause, I—

Mr. Krause: I may be back to a former witness.

Mr. Williams: Your Honor, if I could just be heard before counsel asks the question, perhaps we can obviate this whole difficulty. It is our position

(Testimony of Herman H. Larson.)

—I thought I understood the Court's ruling on it, but maybe I am in error—that in order to enable this witness to answer a proper hypothetical he must be told whether the man in the launch has observed this man and, therefore, what his duty is or, in the alternative, what his duty is to observe him, one way or the other.

The Court: I quite agree with you. After all, for all this witness may know the second engineer may have been engaged in some duty on the launch and he wouldn't even have observed the man. I understand that. And, that is the reason why I think this hypothetical to this witness should include the factual situation as contended by either [331] of the parties. And, I think it can obviously be, as far as the record is concerned, supplied if you will just let the record show that this witness has been here in the courtroom and has heard all the testimony that's been going on here concerning this.

Mr. Krause: Well, I have no objection to putting it that way. I would be afraid of it if counsel objected to that kind of a question because we still don't know what he heard.

Mr. Williams: I am afraid——

The Court: Well, assume the facts have been testified to by——

Mr. Krause: Yes.

Q. Well, Captain, have you been in the courtroom while Mr. Farley was on the witness stand, John Farley, the Libelant? A. Yes, sir.

(Testimony of Herman H. Larson.)

Q. Were you able to hear his testimony?

A. I think I did, yes.

Q. You have in mind the facts as he gave them with respect to the launch and the lights and the pilot ladder?

A. Yes, I believe I understand the situation as it was given by Mr. Farley.

Mr. Williams: Your Honor, if I may interject here a moment, this witness was not here the day before yesterday when Mr. Farley testified [332] concerning it, unless I am mistaken.

The Court: I think he was.

The Witness: I was.

Mr. Williams: Were you here the day before yesterday?

The Witness: Yes, sir.

Mr. Williams: Oh. I am in error.

The Court: Then, he testified that he was——

Mr. Williams: I thought he had heard a portion of his testimony but not that.

Q. (By Mr. Krause): Now, based upon Mr. Farley's statement as to the condition there and, in addition to that, that is what he testified to regarding the launch and the light and the ladder and his position with respect to the ladder, and assuming also that at that time a member of the steward's department, the third cook, was going up the Jacob's ladder encumbered with the two bottles that I have described to you before, what, if anything—if any duty did Mr. Farley have?

Mr. Williams: I will object, your Honor, on the

(Testimony of Herman H. Larson.)

ground that there is no way of being able to ascertain what the witness knows about the testimony.

The Court: Of what?

Mr. Williams: How much he heard, what he heard, and what he did not hear of Mr. Farley's testimony the day before yesterday.

The Court: Well, he said he heard it all and [333] we have to accept his testimony.

Mr. Williams: Very well, your Honor. But, I wish to object to it.

The Court: You may answer the question.

The Witness: As I recall, Mr. Farley stated in his testimony that he stood approximately four or five feet from the ladder; that he came from the after part of the launch and walked between the ship's side and the launch up to the ladder when this third cook started going up the ladder. And I also recall that he said he did not observe the third cook having any packages in his hand.

Mr. Krause: Yes.

The Witness: Well, in my opinion Mr. Farley certainly should have noticed the man going up the ladder with packages in his hands and, therefore, should have cautioned him—as an officer he should have cautioned him not to attempt that, that would create a hazard not alone for the man himself but for anyone that was within a certain radius of that ladder as it later proved.

Q. (By Mr. Krause): What is the obligation—assuming that a man is standing, whether he is a licensed officer or not, that he is standing within



(Testimony of Herman H. Larson.)

four or five feet of the foot of a Jacob's ladder eighteen to twenty feet high up to the main deck while another man is going up, what is the duty of any member of the crew under those circumstances? [334]

A. First of all, speaking for myself, I certainly would not stand near the bottom of any ladder of a man going up and if he was going up I certainly would look up to observe what was happening above my head. And, if I was anywhere near where I saw a man at the bottom of a ladder where another man was on top of him I surely would caution him to step aside and get out of the radius where anything might happen.

Q. Is a position four or five feet from the base of a Jacob's—the lower end of a Jacob's ladder a safe place to stand while another man is climbing the ladder?

A. I don't think so.

Mr. Krause: You may cross-examine.

The Court: I think we will interrupt and take ten minutes.

(Recess taken.)

Mr. Krause: With the Court's permission, could we call Dr. Cohen who is here now and withdraw Captain Larson? Does counsel agree to that?

The Court: Is that agreeable?

Mr. Williams: Yes.

The Court: All right. [335]

## LAWRENCE J. COHEN

produced as a witness on behalf of the Respondent, being first duly sworn by the Clerk, was examined, and testified as follows:

## Direct Examination

Q. (By Mr. Krause): Will you state your name, please?      A. Lawrence J. Cohen.

Q. And, your profession?

A. Physician and surgeon.

Q. You have a specialty, Doctor?

A. Yes, sir, I have.

Q. What is it?      A. Orthopedic surgery.

Q. How long have you been practicing here in Portland?

Mr. Williams: We will concede the expert qualifications of the witness.

The Court: Is that satisfactory? If you wish to qualify your doctor——

Mr. Krause: Well, I would just like to ask the Doctor one or two questions about where he received his training.

The Court: You may, sir.

Q. (By Mr. Krause): How long have you been practicing your specialty in Portland?

A. Since 1949. [336]

Q. What preparations do you have for this specialty?

A. Well, I graduated from the University of Maryland Medical School in 1934 and I had initial internship at the Sinai Hospital in Baltimore and in Johns Hopkins Hospital in Baltimore until

(Testimony of Lawrence J. Cohen.)

1937. From '37 to 1940 I was at the New York Hospital for Bone and Joint Diseases in orthopedic surgery. From 1940 until 1946 I was in the United States Army in orthopedic surgery. From 1946 until 1949 I was in the U. S. Veterans Administration Hospital at Vancouver, Washington, and at Portland.

Q. Doing orthopedic work there?

A. Yes, sir.

Q. Since that time you have been practicing privately?

A. Yes, sir.

Q. Now, Doctor, are you acquainted with John Farley?

A. I am, sir.

Q. When did you examine him the first time?

A. I examined him the first time on the 23rd of February, 1954.

Q. How many times have you seen him since?

A. I saw him on one occasion after that on the 26th of April, 1955.

Q. You did not have him under treatment, I take it?

A. No, sir, I did not.

Q. What sort of examination did you make, Doctor? [337]

A. Well, I made the usual type of orthopedic examination which includes a male removing all of his clothes, examining his major joints, musculature, gait, muscle strength, question of atrophy, neurological examination which indicates nerve innervation into the extremities, and X-ray examination.

Q. You have those X-rays here, do you?

(Testimony of Lawrence J. Cohen.)

A. I do, sir.

Q. And they were taken on what date, the X-rays?

A. The X-rays were taken on March the 13th, 1954.

Q. What did your X-rays show as to any injury to any of the bones of his body?

A. Well, it revealed a fracture of the seventh, the eighth, and the twelfth dorsal vertebrae and, to a slight degree, the tenth, and a fracture—a healed fracture of the clavicle, the right clavicle.

Q. Were all of those fractures healed at the time you had your X-rays taken?

A. Yes, sir, they were.

Q. First of all, with respect to the clavicle, what was the nature of the repair?

A. The repair was excellent, the alignment was good, the function was good. It was separated from the shoulder joint so that the joint itself was not involved.

Q. Was there anything in the appearance of the [338] clavicle after the repair that would have anything to do with the use of the shoulder and arm now or would indicate any inability to use it?

A. By X-ray, no, sir.

Q. X-rays would not. Now, with respect to the vertebrae, what was the nature of the injury to the vertebrae?

A. They were compression fractures of the body of the vertebrae. The one primarily involved was



(Testimony of Lawrence J. Cohen.)

the eighth. The others were minor. The seventh was minor, the tenth was very minor, and the twelfth was almost imperceptible. But, they were healed solidly.

Q. Now, at the time you took your X-rays, that was about, well, not quite two years after the date on which this man sustained his injury?

A. That's right, sir.

Q. He was hurt on the 6th of April, 1952, and you took your X-rays on the——

A. 13th of March, 1954.

Q. ——13th of March?

A. I beg your pardon, sir. The 23rd of February.

Q. 23rd of February, 1954?

A. (Witness nods head.)

Q. Now, what is shown in your X-rays? Does it indicate how recent those fractures were?

A. No, I couldn't say. I could only say that [339] they were solidly healed. They may be any time from a year onward or seven, eight months onward to ten, fifteen, twenty years. I couldn't tell.

Q. That is, it could have been within seven or eight months or as old as fifteen years?

A. That's correct.

Q. Now, when you speak of compression fractures, does that mean that the entire vertebra has been compressed or just a portion of the vertebra?

A. It usually means that the body of the vertebra has compressed mainly in its anterior portion or the front of the vertebra.

(Testimony of Lawrence J. Cohen.)

Q. Oh. Well, on these X-rays does it appear that the entire vertebra was compressed or just the anterior portion?

A. On the eighth some of the posterior was compressed a little.

Q. Yes.

A. On the others it was mainly only the anterior. The posterior was intact.

Q. Yes. That results, then, on the X-rays in a sort of a wedge-shaped appearance of the vertebra?

A. Yes, sir.

Q. That is, it runs down more toward a point on the anterior or front portion of the vertebra?

A. That's correct, sir.

Q. Now, as far as the repair in the vertebra is concerned, Doctor, does that in itself—I mean, the shape of the vertebra now, their position and so, would that indicate any disability or cause any disability in itself?

A. Well, when you speak of disability referable to the man, yes, it would cause some disability in the shape of a man's back. But, with the location, we might—we have to speak of disability in fractures of the vertebra in locations. The most quiet portion of the spine to be injured is right there (indicating). In the mid-dorsal area you can have a fracture of a vertebra with little disability. The most serious portion of the spine to be injured with that much compression is the cervical vertebra and next comes the lower lumbar vertebra. So, at the mid-dorsal vertebra that is the quietest place

(Testimony of Lawrence J. Cohen.)

that you can have a compression without disability.

Q. When you get to the lumbar vertebra that is carrying the great weight, more weight than the dorsal?

A. And movement. Movement is a factor. The cervical moves more than any, the vertebral portion of the lumbar moves next, and the dorsal moves least and primarily only with inspiration and expiration of the lungs so that movement actually to bending and lifting is almost non-existent in the dorsal vertebra. [341]

Q. Now, as far as the appearance of the vertebra, the spinal column, and the clavicle, could a man have complete function—perfect function?

A. With the vertebra and the clavicle?

Q. As you find the bones to be now would it be possible to have perfectly good function assuming that he had no muscular, nerve trouble, or anything of that sort?

A. Oh, it's quite possible.

Q. That is, there is no malformation that in itself prevents any use of the back or the shoulder?

A. That's right, sir.

Q. Now, then, does this man have a disability resulting—well, does he have any disability now with respect to his back and shoulder?

A. Yes, I believe he has a disability both in his back and shoulder.

Q. What is that disability due to?

A. The disability, of course, is the result of soft-tissue damage, age of the patient, limitation

(Testimony of Lawrence J. Cohen.)

of motion of a shoulder joint. Now, we will speak of the shoulder first. When the outer end of the clavicle is injured you have bleeding around a section of the soft tissues, you have general splinting of the arm. You may injure an arm of course, without fractures and have limitation of abduction, internal or external rotation of a shoulder, and [342] then as the months go by there is gradual restitution of motion. In some people it's faster than others. In some people there is no ultimate limitation of motion even after such an injury. In other people there is limitation of motion. With Mr. Farley there was limitation of motion for a relatively long period of time. There still remains a little bit of limitation of motion in the shoulder.

With relation to his back, again you have the age of the man, the size of the man, the direction of the blow, and again the ability to reinstitute himself to his former position by exercises and by means of his own ability, his own body to bring him back to normal again.

Q. Now, other than the X-rays is there anything in your last examination that confirms Mr. Farley's complaints of inability to work? I mean, are there any objective symptoms other than the old fractures?

A. If I may read this physical examination, sir?

Q. Well—— A. On the last—I——

Q. You may use your notes to refresh your memory anyway.

A. I said that his abduction in the right—in



(Testimony of Lawrence J. Cohen.)

the shoulder was better than it was at the previous examination a year before; that I was able to abduct his shoulder to 180 degrees which is normal. Prior to that, my last examination, I think the abduction was somewhat less. The abduction was 170. [343]

Q. Abduction, is that just bringing the arm out straight to the side and up?

A. We call this the coronal plane straight up. And, there was 20 degrees limitation of backward flexion and that is this (demonstrating). Now, that is the worst of all positions to do after an injury around the shoulder.

Ordinarily we are able to get a thumb at a point between the wing bones or between the scapulae but Mr. Farley can't get it quite between. I estimated it about 20 degrees. Now, that motion is the one we usually use to put our hands in our pockets, to help to comb our hair, to scratch our backs, and that sort of thing. But, for movement in front it is pretty good. That was about 20 degrees.

The internal rotation is this one (demonstrating) and that was limited by 20 degrees. That is this one (demonstrating).

Now, this one (demonstrating), of course, is the most important. External rotation is the most important one, and he had that pretty—that was good.

Q. Well, now, Doctor, when you say that there was limitation in motion do you mean to say that

(Testimony of Lawrence J. Cohen.)

there was a physical stopping or block of any further motion?

A. Yes, that's what I would say.

Q. A physical obstruction to his further [344] motion or was it because of pain that he suffered or said he suffered at that point?

A. Well, it was probably the latter. But, nevertheless, I must consider that a physical *imitation*.

Q. Well, then, let me see if I can get my terms right.

A. You mean by a—by a block due to a bony ridge or some disturbance in the joint causing a limitation of motion? No, it was not that kind of limitation.

Q. The part of the joint might be fused, might have grown together— A. No, it was not.

Q. —that you couldn't move it past that point?

A. It was not that sort of thing.

Q. Well, are there any physical blocks of the kind that I have spoken about now that prevent any of these motions? What I want to know is does this limitation of motion that you find result from the fact that he says it hurts when he goes farther than that?

A. No. It is a little more than that.

Q. It is a little more than he complains of pain?

A. It is a shortening of muscle structures. Now, when we have pain we have limitation of motion. If that continues along a long time we get some shortening of muscles and with rehabilitation

(Testimony of Lawrence J. Cohen.)

and with exercises those muscles are lengthened back to their normal size again and then we [345] have return of motion in a joint that is not physically blocked. With Mr. Farley there is some limitation still remaining from the shortening, I would say, of muscles rather than any physical block.

Q. Now, are there other conditions contributing to this disability that you find him suffering today, any condition other than those that might be attributable to an accident?

A. Well, I would say that one of the difficulties is his age. People who are injured when they are older don't respond as well. Of course, under that there are many things which have to be considered. When you are younger you make a tremendous effort, of course, physically and mentally to respond and to get back to normal. When you get a little older you don't have quite that same drive either physically or mentally to get back to the same condition again.

Q. Well, are there any other evidences of disease in your X-rays, in the X-rays that you have examined here?

A. There is evidence of arthritis in the lumbar spine, mainly; some in the dorsal spine.

Q. Any arteriosclerosis?           A. Yes.

Q. Well, how do these pictures stack up with the average ordinary hard-working person that has had some exposure and also work at hard labor? [346] How does Mr. Farley compare to the average person?

(Testimony of Lawrence J. Cohen.)

A. Well, I think for a man of Mr. Farley's age that people his age have hypertrophic arthritis and they have arteriosclerosis. There is one point, however. In his upper lumbar spine that is a little more osteoarthritic than the average person's at his age.

Q. Well, upon your last examination, Doctor, what was your opinion as to the extent of his ability to follow a gainful occupation?

A. Well, I felt that he could not do—he probably couldn't go back to hard lifting and work that he had done before but he should be able to do a fair amount of work, one that didn't involve heavy lifting. But, he should be able to get on his feet. He should be able to do some work.

Q. Would anything that you find in his condition make it inadvisable for him to paint the outside of buildings, for example?

A. I think he could paint. I think, however, that he might have some pain in his shoulder from painting. But, if he were working above his head much I think you could paint and try again.

Q. Well, is there anything wrong with the other shoulder, the one where the clavicle was not broken?

A. No, nothing wrong.

Q. Well, is there any reason why that arm can't be used for painting?

A. Not at all.

Q. Is there any limitation in that arm?

A. None. None.

Q. Did he complain of any pain in it?

A. No, sir.



(Testimony of Lawrence J. Cohen.)

Q. Which shoulder was it that he had injured?

A. The right.

Q. The right shoulder. He was, according to testimony, a right-handed man?

A. Yes, sir.

Q. Is it something not too difficult to accustom yourself to working with your left hand when your right one is disabled?

A. Oh, you can do it. When you get a little older it's pretty hard to change over.

Q. Harder when you're older? A. Yes.

Q. Could you give us an idea as to what types of occupation you think Mr. Farley could follow that, of course, wouldn't require particular training or education?

A. Well, I think he could be a watchman. I think he could do gardening and that would include many varieties of gardening, of course. Carrying of heavy loads, you couldn't carry as much as he could before, I think, but he could probably [348] use a little handcart to push some loads around. I think he could be a salesman. I think he could work in a grocery store. Oh, I think he could do innumerable jobs.

Q. On land. But, you wouldn't advise his going back to sea?

A. Well, I think he could still go back to sea too if he didn't have to climb much or do heavy work. I think he could be back to sea. I am really not acquainted with all the jobs at sea that you can do.

(Testimony of Lawrence J. Cohen.)

Q. There are occasions when they climb up and down ladders and also have to lift fairly heavy objects 75 to 100 pounds, anyway.

A. I think it would be hard for Mr. Farley to lift 75 or 100 pounds.

Q. Now, would any work of a heavy nature cause him any injury now or it just the matter that it would cause him pain?

A. It would cause him some pain.

Q. It would cause him pain. But as far as lifting is concerned even that he could—could he injure himself further by doing heavy lifting?

A. No, he would not injure himself further.

Q. And his limitation is due to the fact that at a certain point the thing might become painful?

A. That's right.

Q. Is that right?           A. Yes, sir.

Mr. Krause: I think you may cross examine.

#### Cross Examination

Q. (By Mr. Williams): Now, Doctor, when you made your first examination of Mr. Farley it was, I see here, a little over a year before you made a second. You made two examinations?

A. That's right, sir.

Q. A little over a year apart, is that correct?

A. Yes.

Q. And, the second time you saw him did that pretty much confirm your earlier diagnosis; that is to say, did you find it substantially the same as you found him the first time?

(Testimony of Lawrence J. Cohen.)

A. I found his back substantially the same, yes. I found his shoulder better.

Q. Shoulder was better. Back about the same?

A. (Witness nods head.)

Q. Your earlier report, you feel, is correct as of this date except for the change in his shoulder condition?      A. Yes.

Q. Now, Doctor, if you were to assume that a man fell from a height approximately 20 feet and [350] landed on another man's head and shoulder and the person who had the man land on him were to come in and see you—well, let's say, a matter of a few months after the injury and you were to find the existence of four compression fractures, let's say, the seventh, eighth, tenth, and twelfth dorsal vertebrae, would it be your conclusion that the accident had caused that injury?

A. If the man told me that he had no trouble before I would have to make that conclusion.

Q. Well, now, Doctor, it is true, isn't it, that it would take a very—it takes a very substantial force to cause a compression fracture of a vertebra, does it not?      A. Yes.

Q. In other words, you don't get a compression fracture just working around the house, or something of that nature, unless you fall or—

A. That's right.

Q. —or a sudden force is exerted upon the—      A. That's right.

Q. You don't get one from the same sort of

(Testimony of Lawrence J. Cohen.)

an accident that would produce a hernia or lifting, it wouldn't cause a compression fracture?

A. No.

Q. And if you assumed a man fell on Mr. Farley in this case on about April 6, 1952, is there [351] any doubt in your mind if you assume further that he has had no pain in his back prior to that time—is there any doubt in your mind but what that accident caused these compression fractures that you found two years later?

A. If I assume those things there is no question in my mind.

Q. There was no question. You find, I think you stated, an ordinary amount of osteoarthritis in this man's dorsal and lumbar spine? A. Yes.

Q. Average for his age and occupation, you would say? A. (Witness nods head.)

Q. Now, you have stated, have you not, that it would take a substantial force to cause those multiple compression fractures that you have related? In other words, that isn't the sort of—you don't get injuries like that from a light accident, it's a substantial force exerted in order to cause those compression fractures, is it not?

A. Oh, you could get an injury just like this from riding in an automobile.

Q. You mean if you were—your body were to move rapidly?

A. Without hitting anything.

Q. Yes?



(Testimony of Lawrence J. Cohen.)

A. Snapped forward you could get practically the same thing. [352]

Q. But, in either case that would be a substantial force? A. Yes, I would say it is.

Q. It takes a hard blow? A. Yes. A snap.

Q. You would say substantially traumatic injury wouldn't you? A. Yes.

Q. Now, when a man has osteoarthritis he may well have it at the age of 58 may he not and have no pain or disability from it at all?

A. That's right.

Q. Now, when he is subjected to a force sufficient to cause at least four compression fractures to his spine, is it not true that you would ordinarily expect to find the aggravation of that pre-existing osteoarthritis?

Mr. Krause: Now, your Honor, I don't think there was testimony that there were four compression fractures. There are three with a possibility of a fourth. That's all I heard either doctor say.

The Witness: That's right.

The Court: Do you want to rely on your hypothetical or do you want to change it?

Mr. Williams: Well, my understanding is—perhaps I was—well, I will withdraw the question.

Q. Let's just assume that there are only three [353] for the purpose of the question. Can you answer that, Doctor, all right? Have I given you enough facts to enable you to—

A. Yes. I really don't know.

Q. Yes?

(Testimony of Lawrence J. Cohen.)

A. I don't know. I can only say this that the X-rays that I looked at, if I may mention that, which were taken very early, two months after the injury, had the same amount of arthritis that is present now by X-ray. So, it hasn't changed any by X-ray.

Now, if you say "Symptomatically would it change?" that would depend on whether I assumed the man had no trouble before——

Q. Yes.

A. ——and now has trouble. I would have to make that assumption.

Q. Very well. Doctor, will you please assume that the man has had no difficulty with his back, no symptoms of pain or limitation of motion, prior to the injury such as I have described where a man fell approximately 20 feet on him landing on his head and shoulders causing multiple compression fractures of his dorsal spine. If you assume that at the time of that injury the man had average osteoarthritis for a man of his age would you not normally expect that such a force as that could cause an aggravation of that osteoarthritis? [354] Would you not normally expect that?

A. I would normally expect it, yes. I would normally expect it.

Q. Yes. And, if your expectations were followed by complaints of pain and disability or limitation of motion in the dorsal back area would that further firm up your conclusion?

A. Not particularly.

(Testimony of Lawrence J. Cohen.)

Q. It would not? Why, Doctor? You mean because——

A. Well, you can have limitation of motion without arthritis. You can have limitation of motion in a child who is injured. You see, a child who has an injury of the back and compression fracture exactly like this will have limitation of motion.

Q. Just from the compression fracture?

A. That's right.

Q. I see.

A. And, as time goes by they may still have some limitation of motion without arthritis.

Q. Yes?

A. Now, I am not sure—I am really uncertain about the whole question of what aggravation means. Unless I could see these things in a knee joint or in a hip joint I cannot rightly say that the arthritis is aggravated. I can only say that muscle spasm or muscle pain is limiting. Because of the pain factor I can't truly say that arthritis has been aggravated.

Q. Well, you can't ever demonstrate that by X-ray, can you, Doctor, generally?

A. Yes, you can occasionally demonstrate it by advancement over a period of a year or two years during that period.

Q. That is unusual, is it not, in the back area?

A. Yes, in the back area it is unusual because it is so confusing. The whole back area is confusing because after you reach in your fifties you get arthritic changes and we never know. In this man

(Testimony of Lawrence J. Cohen.)

nothing struck me particularly as being arthritically or differently arthritic. I felt that his back pain was the result of compression fracture areas and disturbance of muscle functions and——

Q. In that area? A. In that area.

Q. Yes. You feel that with a force sufficient to cause these multiple compression fractures that there would be attendant strain of ligaments and muscles in there? A. Yes, I do. Yes.

Q. And, in a man his age is it likely that all of that would heal entirely; that is, those soft-tissue injuries?

A. I don't think they heal as we speak of healing, to go back to a period of time as it was exactly before. I don't think that's possible.

Q. I see. You mean although there may be no inflammation there—— A. Yes. [356]

Q. ——that the structures are not the same as they were before? A. That's correct.

Q. Doctor, I think you mentioned—and I think inadvertently—that the fracture to the twelfth vertebra was nearly imperceptible. Would you like to look at your X-ray again on that? I don't believe you mean the twelfth when you say that.

A. Maybe I don't.

Q. I think you mean the tenth.

A. Yes. Maybe so.

Q. Because I believe you will find from your report and other items that there is a very substantial wedging of the twelfth. Is that not correct?

A. Yes, you are right.



(Testimony of Lawrence J. Cohen.)

Q. Yes?

A. It is the twelfth. And, the minor fracture of the tenth which is possible——

Q. On the upper surface of the tenth, is it not?

A. Yes.

Q. Doctor, do you have your X-rays before you?

A. Yes.

Q. Do you have a view of the back—I know I [357] will not describe it correctly from a medical standpoint——

A. I haven't put these in. These haven't been recorded.

Mr. Krause: Well, we have listed them here and we are going to offer your X-rays in evidence, Doctor.

The Court: Any objection?

Mr. Williams: No objection.

The Court: They will be received.

(X-rays of Dr. Cohen were thereupon received in evidence as Respondent's Exhibit Number 4.)

Q. (By Mr. Williams): Doctor, do you have an X-ray view of Mr. Farley's back when you are standing behind him looking at it?

A. Standing behind him?

Q. Standing behind him looking at it?

A. Yes.

Q. Looking at his back?

A. I have one of these.

Mr. Williams: May I approach the witness, your Honor, so I may question him?

(Testimony of Lawrence J. Cohen.)

The Court: Yes, you may.

The Witness: Would you put that up?

(Whereupon the Crier placed the X-ray in the view box.)

The Witness: This is '53. Here is one of the [358] back. Is that the one you mean?

Mr. Williams: Yes, I think so.

Q. This is not a particularly good view to demonstrate these irregularities, is it, Doctor? A side view is better? A. Yes, a side view is better.

Q. Do you notice any irregularity in the fourth dorsal vertebra on the right side particularly?

A. Well, yes. The trouble with this on the fifth—and it's on the sixth—you see, and that could be the mild curvature there at that portion of the back and there is something that looks like it on the third. Yes, I notice irregularities but I don't think they are fractures.

Q. You don't think they are old fractures?

A. No.

Q. Or you are unable to say that they are? You say they are not?

A. I don't think so. That doesn't look like it to me. There is one there (indicating) and there is another on the right side.

Q. Yes?

A. And this is the first, second, third, fourth.

Q. No. I would think—and there is——

A. And there is one on the fifth. I would think that is the result of the mild curvature, we call it,

(Testimony of Lawrence J. Cohen.)

a little scoliosis. And, that would produce a [359] different size on one as compared to the other.

Q. Yes. That sort of notching, you might say, in the side view of it, is that a normal condition?

A. This (indicating)?

Q. Yes?

A. Yes, that is relatively—it's not normal but as you grow older and you develop a scoliosis you will get a wedging on one side as compared to the other. The concave side of a curve is narrower than the convex side of a curve, therefore, it is a little smaller on that side. No, I would think that that—

Q. Now, Doctor, have you an X-ray of the side there? A. Yes.

Q. Indicating E-7?

A. This is the seventh and the eighth. Nine is all right. Ten—well, ten could be reported. Now, ten is lower down.

Q. You can't see but, on this film, Doctor—this is D-8, is it not? A. Yes.

Q. Is that about half of it's normal body?

A. I would say approximately half.

Q. And this one here that is D-7 is the posterior side of that preserved or is that kind of squashed down too?

A. I think it is practically preserved. [360]

Q. It is the anterior portion of it?

A. Yes. I think it may be a millimeter or two.

Q. That is a fairly severe wedging, is it not?

A. This one (indicating)?

(Testimony of Lawrence J. Cohen.)

Q. Yes.

A. No, I would not say that is severe.

Q. But, it is a marked one, at least, not at all difficult to pick up?

A. That's right. Severe wedging, I would consider this here (indicating).

Q. Well, there actually isn't much of a wedge-shape, is it, it is squashed flat?

A. It's squashed in it—well, not squashed.

Q. But, I mean to say—I mean, practically uneven. It isn't wedged?

A. Yes. Back and front with the front a little more than the back. But, the whole vertebra—the whole body is down.

Q. When you observe injuries of the type that we have described here where a sudden force is exerted on a man's head and shoulders, do you normally find that is often transmitted into the dorsal spine? Is that where you normally find it?

A. Almost always in the dorsal when they are hit on the head and shoulders.

Q. They don't get it down in the lumbar or cervical? [361]

A. Oh, they do, but—

Q. It is more often—

A. In the dorsal spine.

Q. Do you have a view showing the twelfth?

A. Yes. This is the twelfth.

Q. Right there (indicating) that shows the wedging that you spoke of?

A. Yes; the wedging anterior.



(Testimony of Lawrence J. Cohen.)

Q. Wedging on the anterior surface of it?

A. Yes.

Mr. Williams: I believe he has indicated this one, your Honor (indicating).

The Court: Yes.

Q. (By Mr. Williams): Doctor, when you made your first medical report of Mr. John Farley, did you write up a formal report of it? A. I did.

Q. You did? A. Yes.

Q. In letter form? A. Yes, sir.

Q. Is this a copy of that report (counsel hands document to the witness)? A. Yes, it is.

Mr. Williams: I believe counsel—— [362]

The Court: What exhibit is that?

Mr. Williams: I beg your pardon, your Honor?

The Court: What exhibit is that?

Mr. Williams: That is Exhibit 2. It's not yet been offered.

Mr. Krause: Well, yes. Of course, it wouldn't be evidence.

The Court: I understand that.

Mr. Krause: Now, I don't know what purpose counsel has in introducing it. If he means to impeach the witness in any respect I think he is obligated to show that portion to the witness.

(Whereupon the Crier handed the document from Mr. Krause to the witness.)

Mr. Krause: Very good. Oh. That is the first report, yes.

Mr. Williams: Yes, the first report.

Q. First of all, before I ask you about that,

(Testimony of Lawrence J. Cohen.)

Doctor—— A. You may, yes.

Q. ——do you feel that the largest portion of this man's injury is due to his age or—excuse me—of his disability and his pain is due to this injury, or is it due to his age?

A. I would say the largest—I would say the [363] larger part is due to the injury.

Q. Is due to what? A. To the injury.

Q. Due to the injury?

A. (Witness nods head.)

Q. You think he will always have pain from the condition which you find there right now?

A. Yes, I think so.

Q. You think he always will? A. Yes.

Q. Do you think he can stand for long periods of time?

A. What do you mean by "long periods"?

Q. Well, I mean over, let's say, fifteen or twenty minutes? A. Oh, yes.

Q. Without considerable pain?

A. Oh, yes; I think so.

Q. You think so? A. Yes.

Q. You think he could stand for over an hour, Doctor? A. Yes, I do.

Q. You do? A. Yes.

Q. Well, in your report, for example, you stated, "I am certain that he cannot stand for long periods of time." [364]

A. I mean three hours and four hours.

Q. Oh. That's what you meant by that?

A. Yes.

(Testimony of Lawrence J. Cohen.)

Q. Do you feel that he can do any work that requires lifting or very much bending?

A. No, I don't think he can do that now.

Q. Yes.

A. He might be able to do it in two or three years.

Q. Do you think——

A. I think right now as you look at him I don't think he can do any heavy bending or lifting.

Q. Do you think his condition is the same now—do you think it is substantially stationary now or do you think he is going to get considerably better? What do you think?

A. Of course, the question of something being stationary is entirely relative.

Q. I realize that.

A. If somebody said that after such a period of time it is probably or, perhaps, stationary I think that that's probably not true.

Q. Oh. You don't think he is stationary now?

A. No. I just want to finish.

Q. Oh. I'm sorry, Doctor. I misunderstood.

A. I just want to say that in injuries there is pain. Now, I think it is stationary as far as the [365] compressibility of the vertebrae is concerned or it's stationary as far as the ligamentous structures are concerned but I don't think it is stationary as far as relief of pain is concerned. And, that is the most disabling thing according to Mr. Farley that exists here and that is the most disabling thing as far as I am concerned is his pain,

(Testimony of Lawrence J. Cohen.)

not in any way the structural phenomena in this injury.

Q. Doctor, there is a substantial limitation in motion of his back, is there not?      A. Yes.

Q. That you can demonstrate?

A. Yes. But, that isn't the place where limitation of motion occurs. The dorsal spine almost has no motion in it, ordinarily. If you recall my physical examination, backward extension is limited by only fifteen—oh, no—there is no list of the trunk. The fingers come within thirteen inches of the floor which is a substantial limitation of motion.

Q. Yes?

A. But, when you put them—him down on his back the straight-leg test is negative bilaterally. Now, that is a very important thing. If you are able to get a straight-leg test up to 90 degrees then you should be able to bend at least 90 degrees from your hips. If you bend less than that it's subjective [366] pain. Therefore, it is my feeling that he will have more motion if the pain factor was not evident.

Q. What do you think causes the pain factor, Doctor?

A. Oh, I think that several things could cause it. I think, one, the injury; I think, two, the man's age; I think, three, his temperament. I think people who absolutely have a relatively low threshold of pain would probably be able to do a considerable amount of work more than Mr. Farley. That, of course, is a personality factor over which the



(Testimony of Lawrence J. Cohen.)

individual, perhaps, has no control. But, nevertheless, I believe that that is a definite fact in this particular injury.

Q. Well, did you arrive at that conclusion just from two physical examinations of Mr. Farley?

A. I arrived at the conclusion because of the injury and seeing other injuries. The injury occurring at D-8 which is not, as I said, a quiet zone. D-12 is rather mild. I arrived at the injury by seeing what other people do with that type of injury. I arrived at it because in low injuries of the lumbar; that is, with rather marked contractures, I have seen incredible return of function. And, in addition, I arrived at the conclusion by the straight-leg test and the negative neurological and the absence of atrophy of the extremities. Those are the things that allow me to arrive at that conclusion. [367]

Q. Doctor, do you think that in an individual, let's say, that is not quite Mr. Farley's age but younger, would you not normally expect to find considerable pain and disability in any individual who sustained four compression fractures?

A. Oh, yes.

Q. It is not his age alone that is causing it, is it?

A. No, it is not. Oh, no. I said that's a factor only.

Q. Yes. And, his pain that he complains of could well be attributable to arteriosclerosis or just to osteoarthritis which has been aggravated by the injury?

(Testimony of Lawrence J. Cohen.)

A. It could be. It could be. I cannot say, but it could be.

Q. You don't mean to indicate that he is exaggerating his symptoms to you?

A. Do I think that?

Q. Yes. A. I am not certain. I am not sure.

Mr. Williams: I believe that's all the questions I have.

### Redirect Examination

Mr. Krause: May I ask whether that report of the Doctor's is in or not now?

The Court: It hasn't been offered. [368]

Mr. Williams: It's not been offered.

Mr. Krause: You haven't offered it?

Mr. Williams: No.

Q. (By Mr. Krause): However, this report that counsel was referring to was made by you somewhat over a year ago? A. That's right.

Q. Now, did you find any evidence of any disability in Mr. Farley with respect to his knees, for example? A. His knees?

Q. Yes, at that examination? Did he have free use of his knee joints or was there limitation in the knees?

A. There was crepitation noted in both knee joints.

Q. Well, what is crepitation?

A. Flexion is limited in the knee joint by 25 per cent bilaterally. Crepitation is crackling and that is a sign of arthritis.

Q. Of arthritis? A. (Witness nods head.)

(Testimony of Lawrence J. Cohen.)

Q. Now, when you say that he had 25 per cent limitation of motion in the knee is that 25 per cent of what a person would normally—figuring that you normally have a hundred per cent of motion, or how is that figured?

A. Well, yes. You would ordinarily—the ordinary motion in the knee joint in a young, vigorous adult or in a young adult is from 180 degrees of [369] extension (demonstrating) to a point of flexion where the heel touches the buttock.

Q. How many degrees would that be?

A. That would be from a hundred and eighty to about thirty-five. So, it's 35 minus 180.

Q. You found that limited about 25 per cent?

A. Yes.

Q. In both knees? A. Yes, sir.

Q. Did he complain of any trouble with his knees at that time? A. He did not.

Q. Now, ordinarily, with that much of limitation of motion in the knees, is that regarded as a disability?

A. Not if a man has no pain and no disability. It will keep him from going into genuflexion. He can't genuflect all day.

Q. Well, you would be a hundred per cent if you had full range in your knees, wouldn't you?

A. You would have a hundred per cent motion, yes.

Q. Now, do orthopedists consider there is a disability when you have a limitation in the range of motion of any joint? A. Oh, yes.

(Testimony of Lawrence J. Cohen.)

Q. You might not be using it in your particular business but for some operations you would be [370] prevented from doing them by that limitation? A. That's right. Yes.

Q. Now, we have been saying here that he has arthritis, evidence of osteoarthritis, about equal to what you usually find in men of his age. Do you find that much limitation of motion in the knees in the average man fifty-eight years of age?

A. Not uncommon. You should.

Q. Do you find crepitation bilaterally?

A. Yes, you find crepitation bilaterally commonly.

Q. Commonly? A. (Witness nods head.)

Q. But, still with full range of motion?

A. Fairly often full range of motion at fifty-eight.

Mr. Williams: Excuse me. May I have the answer again? I didn't hear.

The Witness: Very often at the age of fifty-eight we find full range of motion.

Q. (By Mr. Krause): Now——

A. In the seventies, however, it cuts down.

Q. Yes. Now, did the man give you any history of having injured those knees in this accident that we are now discussing? A. No, sir.

Mr. Krause: You may cross examine. [371]

### Recross Examination

Q. (By Mr. Williams): Now, Doctor, it is entirely possible that the force transmitted on his



(Testimony of Lawrence J. Cohen.)

head and shoulders would be sufficient to cause an aggravation of an arthritis in the knees just as well as any other place in the body, is it not?

A. I would say it is hardly likely.

Q. Why not? I mean, they are supporting the weight of the body also.

A. Well, so are the hips.

Q. I beg your pardon? A. So are the hips.

Q. Yes? A. I think.

Q. The force would be transmitted all the way down to the soles of his shoes, wouldn't it?

A. Yes, they would. But, I think if a force sufficient to injure knees would be transmitted to the knees it would have to be transmitted through the hips in order to do it and the hips should get something too. The hips didn't get it too. It would have to hop the hips and go into the knees. I would say it is not likely.

Q. Of course, Doctor, you don't know but what this man may have been knocked down on his knees by the force. I mean, in other words, he—— [372]

A. He didn't——

Q. He had to fall some way and it is possible his knees could have struck directly on the ground around there? A. It is possible.

Q. In which case you would expect it to cause something like what you found, I presume, would you not? A. Well, no.

Mr. Krause: Your Honor, may I say that there isn't a word of testimony that he sustained any injury to his knees.

(Testimony of Lawrence J. Cohen.)

The Court: Purely speculative.

Mr. Krause: Just speculating on something not in the record.

Q. (By Mr. Williams): Dr. Cohen, what is the 25 per cent flexion of limitation that you refer to? What movement is that?

A. Maybe I can show that (demonstrating). If you take your knee, ordinarily you can make your knee touch your buttocks. Now, Mr. Farley's was about to there (demonstrating).

Q. About to there?

A. Now, that's 25 per cent of flexion (demonstrating). Now, I don't say it is 25 of the whole distance.

Q. Yes?

A. Mr. Krause, I don't say it's 25 per cent of [373] from 180 to 35. It is 25 per cent of flexion from here (demonstrating) to there (demonstrating).

Q. Of that?

A. Of that arc. Now, we find that—we don't find—as I say, we find that there is nothing terribly unusual about it. But, it is not common.

Mr. Williams: I have no further questions.

Mr. Krause: That is all, Doctor. Thank you.

The Court: That's all, Doctor. You may step down.

Mr. Krause: May I have my copy of that report back?

(The witness hands the document to Mr. Krause.)

Mr. Krause: Thank you.

The Court: We will recess until 1:30.

Mr. Krause: As I say, your Honor, the only witness we have is to complete Mr. Larson. Now, if your Honor is going to be accommodated by going through I think all of us could do it if that would be all right.

The Court: How long do you anticipate it will take you?

Mr. Krause: Well, Mr. Larson is on cross examination.

Mr. Williams: I haven't started yet, your Honor. I don't think it would take very long.

The Court: Well, let's get that behind us then.

Mr. Krause: We have just reached that point.

Mr. Larson, would you go back, please?

### HERMAN H. LARSON

produced as a witness on behalf of the Respondent, having been previously sworn by the Clerk, was examined, and testified as follows:

#### Cross Examination

Q. (By Mr. Williams): Mr. Larson, since 1954 you have not made any foreign voyages, is that correct? A. Not foreign voyages, no.

Q. You're making just inter-coastal and inter-river voyages? A. Coastwise.

Q. And who do you work for?

A. West Coast Trans-Oceanic Steamship Company.

(Testimony of Herman H. Larson.)

Q. Is that company the successor of W. R. Chamberlain Company, do you know?

A. That I don't know. I really couldn't say.

Q. You work for them exclusively?

A. Yes. That's right.

Q. Captain, when men are aboard a liberty launch going on shore leave do they have any particular duties or responsibilities toward the ship at that time if you assume that the launch is a privately-operated launch and not the ship launch?

A. I don't think I know what you mean by——

Q. Well, are they on duty when they are in a liberty launch going ashore, Captain?

A. Are they on duty?

Q. Yes?           A. No.

Q. And do they have any duties with regard to other men in that boat at that time pertaining to the ship?

A. Well, as an officer he has the duty to see that men not alone conduct themselves properly and also that they do not jeopardize themselves in any way.

Q. Is it your testimony, Captain, that a second assistant engineer would be in charge of a liberty launch?           A. No, sir. No, sir.

Q. It's true, is it not, there is no one in charge under those circumstances?

A. The operator of the launch is in charge.

Q. Correct.

A. I might qualify that by saying, as it often has been done, the operator of the launch is in



(Testimony of Herman H. Larson.)

charge with the exception that when the Master of the vessel——

Q. Is aboard?

A. He doesn't—he has no—doesn't give orders as to the actual operation of the launch but where the destination of the launch and its coming and going at certain intervals and times, that is up to the Master. [376]

Q. Yes. When someone is on board a liberty launch, it's true, is it not, if he is an officer, we will say, a second assistant engineer, it is true, is it not, that he has no duties with regard to the ship's crew until they all return to the ship?

A. Well, no actual duties any more than as an officer. At all times an officer has the responsibility to see that there is no injuries or no acts committed that should not be committed. That is the duty of an officer no matter where he is.

Q. You mean ashore?

A. Not on shore, no. No. Coming and going to the ship on the launch.

Q. Do you think he is at duty when he is coming and going?

A. It's not a duty, it is a moral obligation an officer has.

Q. I concede that that is probably correct. Now, Captain, how is the training given to the men aboard the ship? Who gives it as to how a Jacob's ladder should be climbed?

A. How it should be climbed?

Q. Yes. A. Well——

(Testimony of Herman H. Larson.)

Q. Is that the Master's duty or is that someone else's duty? [377]

A. No. I can't recall of anyone ever giving anybody any instructions how it's to be climbed. That seems to be natural with a man knowing it for his own safety when he climbs it.

Q. Well, Captain, let's assume that you have crew members aboard the ship that have never been to sea before. Who will give them the instructions as to how to climb the Jacob's ladder?

A. Now, first of all, when a man goes to sea he is cleared by the Coast Guard.

Q. Yes?

A. And, the Coast Guard accepts that man as being fully able to not alone climb a ladder but go aboard a vessel without endangering himself.

Q. Well, then, it is your testimony he doesn't need any instructions?

A. Well, I can't see where he needs it. It comes by the experience aboard a ship.

Q. Well, suppose you have a man aboard a ship who has had no experience, he has had none, we'll say, in conducting himself about a ship or in climbing ladders.

A. Well, he shouldn't be on a ship if he doesn't know how to climb a ladder. I can assure you of that because there is so many ladders to climb.

Q. Could you find out as they come aboard [378] which ones are trained and which are not?

A. That is a thing that you would have to go

(Testimony of Herman H. Larson.)

and ask each man, "Have you ever climbed a ladder?" You understand, that isn't done.

Q. You don't do that? A. No.

Q. You don't attempt to find out if the men have had previous training?

A. When a man comes aboard a ship he is sent aboard by the union and when he is accepted in the union he is supposed to be qualified to do the work he is sent down to do and that irregardless of whether he is on deck, steward's department, or engine room. It doesn't matter. He is supposed to be qualified. You accept him.

Q. You assume he is?

A. You accept him as that. He shouldn't be a member of the union or he is not accepted in the union unless he is qualified.

Q. Well, is that true with regard to the members of the steward's department? Are they quite experienced at getting around on a ship?

A. That's—they are accepted as that.

Q. Is it not true that they are the least experienced as far as seamanship is concerned——

A. Oh, yes. [379]

Q. ——of all the men on the ship?

A. They are not required to do any seamanship's work.

Q. Yes.

A. But, they are required to get up and down ladders aboard ship.

Q. Which ones?

A. Going various places, going down to the ice-

(Testimony of Herman H. Larson.)

boxes. They go down there to do that—down ladders to do that.

Q. Do you know, is it a vertical one or one that has some stairs, steps on it?

A. There is a ladder of an angle.

Q. It's at an angle? It's not a vertical one?

A. No, not that one.

Mr. Williams: I have no further questions, your Honor.

Mr. Krause: I have no further questions, Captain.

The Court: Can counsel advise me, is there anything in the contracts with the union with reference to retirement age?

Mr. Williams: There is——

Mr. Krause: No.

Mr. Williams: ——there is no testimony on that. There is none as regards this individual.

The Court: My recollection is there is none.

Does either party propose to offer any evidence as to whether a seaman works up until the day he is expected to die? [380]

Mr. Williams: Well, your Honor, we have the possibility of putting on some rebuttal and I expected to use Mr. Farley.

The Court: Well, of course, you put on your life-expectancy witness.

Mr. Williams: Yes.

The Court: And, it just occurred to me on your evidence for damages that you have in the case, do you expect he would die aboard ship?



(Testimony of Herman H. Larson.)

Mr. Williams: Well——

The Court: A natural death at the end of his expectancy?

Mr. Williams: Well, our testimony would be that we would not expect him to work full time as a marine engineer up to age seventy-five, which would be a life expectancy. We wouldn't contend for that, your Honor. But we will contend the age he is able to work is much longer than it is for ordinary men in other occupations. Because of the training and the specialization of it he is able. And that there is no compulsory retirement age.

The Court: Either party going to offer any type of evidence of what the practice is or how long a man in relatively good health does——

Mr. Williams: We could offer it through Mr. Farley, then. [381]

The Court: I will wait then.

Mr. Krause: Well, we have Captain Larson on the witness stand.

### Redirect Examination

Q. (By Mr. Krause): How old did you say you were, Captain?

A. I will be sixty-nine within four months.

Q. You have continued going to sea until how long ago? I mean, steadily?

A. Well, in '54. But, I started going to sea as a boy in the old country and I have gone to sea practically all my life with the exceptions of I was ashore for three years from '20 to '23. Outside

(Testimony of Herman H. Larson.)

of that I have continually gone to sea. And, my reason for retiring is not on account of my health, it is—if you may excuse me—to explain it this way: that my family and my children have grown up and left the home and it is just the wife and I. And, she brought up the point that she has been saying good-by to me for so many years that the few years we had left she wanted me to stay at home. And, that's the reason I retired.

Q. Well, you would say that you would still be able to go to sea now?

A. And, I hope—I might say this that if I can talk my wife out of it I will still go to sea. I long to go. [382]

Q. Now, as far as age is concerned for Masters and licensed officers on merchant vessels, it just depends upon whether they are physically fit and able as to whether they continue to go to sea?

A. Yes.

Q. Is that right?

A. (Witness nods head.)

Q. There is no age limit now?

A. Not that I would know of, no.

Q. Yes.

A. I might add that you have mentioned, brought the subject up, the States line had an engineer going to sea with an artificial leg and he did very well and he was there for a number of years. And, I have seen an engineer with one arm even. I have had them with me and they have done

(Testimony of Herman H. Larson.)

very well. So, I can't see physically there should be any great handicap for a man not going to sea.

Mr. Krause: I think that's all, Captain.

**Recross Examination**

Q. (By Mr. Williams): Captain, did you know an engineer by the name of Mr. Fred Sprague that has been around here in Portland?

A. Yes, sir. I was shipmates with him.

Q. Died recently, did he not?

A. I think so, yes. [383]

Q. Do you know if he worked as a night engineer up until the time that he died?

A. Well, that I don't know because I wasn't home. I was sailing at that time.

Q. I see. Do you know how old he was?

A. He was very old, I can assure you. But, how old, I can't—

Q. Was he in his early eighties, do you know?

A. Yes, he was very—

Q. But, you don't know—how long ago has it been that you know that he was still working?

A. Well, I would say probably three, four years.

Mr. Williams: I have no further questions.

The Court: That's all, Captain. You may step down.

The Witness: Thank you.

The Court: Well, I take it that completes the testimony and you will have your deposition matters?

Mr. Krause: Well, I should offer some of my

exhibits here that haven't been offered. Well, I guess we don't need that, the deposition of Libellant. Deposition of Glenn Morgan, deposition of William J. Accurso. That's 2 and 3. The X-rays of Libellant. They have already been identified and offered. The physical and medical records of John Farley at the United States Marine Hospital at Seattle. [384]

Mr. Williams: I have no objection to any of those, your Honor.

The Court: They will be received.

(Whereupon Respondent's Exhibits 2, 3, 4, deposition of Glenn E. Morgan, deposition of William J. Accurso, and medical records of John Farley, respectively, were thereupon received in evidence.)

[See Exhibit 2 at page 501, and 3 at page 547.]

Mr. Krause: That is 5.

Mr. Williams: Yes.

Mr. Krause: Then, 6, also, medical records of John Farley of the Portland office, they are there. I offer them.

Mr. Williams: No objection.

The Court: They will be received.

(Whereupon Respondent's Exhibit 6, envelope containing records of treatment of John Farley, previously marked for identification as Respondent's Exhibit 6 was thereupon received in evidence.)

Mr. Krause: The rough log of the Augustin Daly is in?



The Court: Those have been received.

Mr. Krause: I am wondering, nothing appeared [385] that I can recall as to why both our rough and smooth log should be in. I brought the smooth log along too but we don't want to have it in here unless there is some reason for it.

Mr. Williams: Well, I have not had an opportunity to examine it thoroughly, Mr. Krause. Unless you have some objection——

Mr. Krause: Well——

The Court: My notes show that we designated the smooth log as 7-A.

Mr. Krause: 7-A, yes.

The Court: That was received.

Mr. Krause: Well, that was because counsel said he wanted it here because he thought there was some discrepancy between the two. Now, nothing has appeared so far on that but perhaps we can leave it here and take it out later if it appears it's not necessary.

Now, the doctor's office records were not brought in but the doctor testified that they would have been necessary to impeach—but the X-rays are here and that is Exhibit 8.

The Court: The X-rays as Exhibit 8.

Mr. Williams: That is under 4.

The Court: Are they under 4? I think those were separate X-rays, weren't they? [386]

Mr. Williams: They would be under 4 as X-rays.

Mr. Krause: The X-rays, those were the Public Health Service records as 4, I think. Is that right?

The Court: The X-rays, Exhibit 8, then, will be received.

(Whereupon Respondent's Exhibit 8, X-rays, previously marked for identification were thereupon received in evidence.)

Mr. Krause: And the Articles of the Augustin Daly, they are here and have been offered.

The Court: They will be received.

(Whereupon Respondent's Exhibit 9, shipping Articles, previously marked for identification were thereupon received in evidence.)

Mr. Krause: License and oath of John Farley. It is the stub of the license of John Farley.

Mr. Williams: Your Honor, I will object to the admission of it on the simple ground it has no relevancy to the case.

The Court: What do you claim for it, Mr. Krause?

Mr. Krause: Well, he takes an oath when he gets this license that he will obey all laws of the United States. Now, that, I would suppose, would [387] include any duties that he has under the law as an officer on the vessel.

The Court: But, what is his obligation when he signs the Articles?

Mr. Krause: The Articles?

The Court: Yes. Is there any obligation contained in those?

Mr. Krause: On the Articles, he signs the Articles like all crew members do with the Master

agreeing not to bring grog aboard the vessel and to obey all the lawful orders of the Master.

The Court: That's all. I didn't know just how far that went. Well, under your theory then it will be received.

(Whereupon Respondent's Exhibit 10 being the second assistant engineer's license of John Farley, previously marked for identification, was thereupon received in evidence.)

Mr. Krause: Now, the deposition of Johnson, you have that one there, Mr. Clerk.

The Court: I guess it hasn't been marked, has it?

Mr. Williams: I don't think it has.

Mr. Krause: Oh. That only just came in. It was taken in San Francisco and arrived here after we started the trial, I think. [388]

Mr. Williams: Yes.

Mr. Krause: Deposition of S. L. Johnson. Well, that is all we have, your Honor.

The Court: Do you have the Johnson deposition?

Mr. Krause: Yes. The deposition of S. L. Johnson.

The Court: That should be marked Respondent's Exhibit 11, I take it.

Mr. Krause: Now, your Honor, may it be stipulated that any of the exhibits that were offered and received, counsel may read or quote in memos any parts of them without reading them into the record here at this time?

The Court: Let the record so show that that is satisfactory.

Mr. Williams: Yes, your Honor.

Mr. Krause: That's all we have, your Honor.

The Court: What is the desire of counsel, do you want to be heard orally or do you want to present it by memo?

Mr. Williams: Well, I have no preference, your Honor. Does your Honor wish to have—I feel it is necessary to give your Honor briefs on the law in this matter. It is somewhat complex.

The Court: I think your facts are not too difficult in this matter and I believe that your respective theories are supported by your authorities. [389] If you want to be heard orally I will hear you at 1:30 or if you want to file a memorandum at a later time and be heard orally it is all right.

Mr. Williams: I would prefer to do it at a later time, your Honor. There are several things in these various depositions—I think Mr. Krause perhaps agrees—that should be pointed out.

The Court: How much time do you need to file a brief?

Mr. Williams: We have a little rebuttal testimony, your Honor. Very little.

The Court: Oh. All right. Then, we wait until this afternoon then. Well, we had better say 1:45.

Mr. Williams: That would be fine.

(Whereupon the Court adjourned for the noon recess.) [390]

#### Afternoon Session

(Whereupon the Court reconvened at 1:45 p.m. pursuant to the noon recess.)



Mr. Williams: Starting the rebuttal of the Libelant we will call Mr. Farley.

The Court: I beg your pardon?

Mr. Williams: We will call Mr. Farley for rebuttal, your Honor. Has counsel finished putting on his case in chief?

The Court: I believe the record shows the Respondent is resting.

Mr. Williams: Mr. Farley, take the stand, please.

### JOHN FARLEY

the Libelant, produced as a witness in his own behalf, having been previously sworn, was examined, and testified as follows:

#### Direct Examination

Q. (By Mr. Williams): Mr. Farley, you were in the courtroom this morning when Captain Larson testified concerning practices aboard ship for providing crews with shore liberty while the vessel was at anchor. Did you hear that testimony?

A. Yes, sir.

Q. Yes. Is there a practice generally prevailing in the shipping industry relative to a particular type of appliance to be used to provide the crews [391] with ingress and egress while going to and returning from shore liberty while the vessel is anchored in the harbor? Is there such a practice?

A. Well, the only practice I seen——

Q. Well, first, can you answer that question "Is there a general practice?"

A. There is a practice of using the gangway.

(Testimony of John Farley.)

Q. When you say "gangway," do you mean——

A. Accommodation ladder.

Q. ——accommodation or gangway type of ladder?  
A. Yes, sir.

Q. They call that a companionway sometimes?

A. They call it this Jacob's—or accommodation ladder.

Q. Yes. Now, is there a practice for using a Jacob's ladder under those circumstances?

A. Well, there is in some ports I have been in where we lay alongside of the dock maybe loaded with coal or something like that and pull away from the dock and pull out in stream.

Q. Yes?

A. And then they take the accommodation ladder up and they wait there maybe for some of the crew to come aboard and they will put the Jacob's ladder over for the men to come up on the Jacob's ladder.

Q. How many men would be returning then?  
[392] You mean a few men have been left ashore?

A. The few men that has been left ashore, maybe three or four men, something like that.

Q. Mr. Farley, can you recall of any instance—you *have to sea* over thirty years, have you not?

A. About thirty years.

Q. Can you recall of any instance when a ship is anchored in a harbor where shore liberty—where a Jacob's ladder was used to provide the crew with shore liberty? Can you recall of any instance like that?

(Testimony of John Farley.)

A. I can't. I can't name no ship where I have been on where I can recall of any ship.

Q. You mean with the exception of the SS Augustin Daly?

A. That's all, the Augustin Daly, yes.

Q. Now, Mr. Farley, have you gone ashore for certain specific purposes on a Jacob's ladder when you were anchored in port?

A. Yes, sir.

Q. And, describe what were the circumstances surrounding that?

A. I was in Morocco and I was on a ship there, the Gillis, I think it was, or either that or the McCoy. We taken bunkers there.

Q. You mean, bunkers of fuel oil?

A. Fuel oil, yes, sir. And, there was no shore [393] liberty granted to the crew so the Chief asked me to take and go up on the hill and get the gauging of the tanks and bring the reading back to him. And, that's what I did. I climbed down the Jacob's ladder and I climbed up the Jacob's ladder.

Q. Yes. Now, Mr. Farley, is there any general practice among marine engineers as to when they stop working? When do they stop going to sea, is there anything that dictates when they shall do that?

A. Well, I know a lot of chief engineers and they—they're going to sea because the companies hold onto the chief engineers. You get aboard of a ship sometime there will be a chief engineer seventy years old or seventy-five, or something like

(Testimony of John Farley.)

that, on a ship and when they're here ashore—there is some of these men ashore here like Charlie—old Charlie and McMann—Joe McMann and them fellows, they're up around seventy-five or eighty years old and they stand nothing but night watches. Quite a few of them up there don't do nothing but stand night watches.

Q. Well, now, is it your testimony that when a marine engineer stops going to sea, assuming he is in sufficient physical condition, he usually stands night watches then as a form of semi-retirement?

A. He goes on that. He stands them. When he [394] comes in rotation he gets them the same as the rest of them.

Q. I see. He stands night watch for ships coming into port? A. Coming into port, yes, sir.

Mr. Williams: Well, first of all, your Honor, I would like to read into the record a portion of Libelant's exhibit relating to wages, Exhibit Number 5. On page 21 thereof it is entitled "Rates of pay and conditions for night relief engineers."

Q. That is the type of job that you referred to, is it not? A. Yes. But, for what dates?

Q. Night relief engineer.

A. What date is that on that book, though?

Q. This particular book is effective—date, June 16, 1954. I am going to read to the Court.

The Witness: Oh.

Mr. Williams: It says "When relief engineers are employed for watch at night between the hours of 4:00 p.m. and 8:00 p.m. or on Saturdays, Sun-



(Testimony of John Farley.)

days, and holidays, they shall be required to maintain an alert watch and shall perform such duties as may arise in connection with the engine department formerly performed by licensed engineers. Effective as of 12:01 a.m., June 16, 1953, the rates shall be \$2.92 per hour." And then it says [395] "Employment effective January 11, 1954."

Q. That would be the applicable rate, would it not, if you were to be working?

A. If I could be working now.

Q. Now, how many hours do you normally work as a relief engineer at night?

A. It depends on what watch you take. If you take from 5:00 o'clock at night——

Q. Yes?

A. ——to 12:00 o'clock you get seven hours, there is another man that comes down and relieves you at 12:00 o'clock at night and he stays till 8:00 o'clock in the morning, and if it is Saturday then there is another man comes down and he relieves you at 5:00 o'clock—or, 8:00 o'clock in the morning and he stays till 5:00 o'clock at night.

Q. Yes?

A. One will get nine hours and one will get eight hours and the other will get seven hours. That is, if the ship is in for that Friday and Saturday.

Q. Yes?

A. But, if it's in Sunday it will be the same way. It proceeds the same thing then till Monday morning and then there is no day engineer comes on, just the night engineer for seven or eight hours.

(Testimony of John Farley.)

Q. Well, Mr. Farley, when would you normally [396] expect to go to sea, you yourself?

A. Well, I thought even before I ever got hurt—thought I would be going to sea for another ten or twelve years because I like going to sea and I would still like to go to sea.

Q. Well, you were aged fifty-eight at the time of your injury. Ten years would be age sixty-eight, I presume. A. Well——

Q. If it were twelve years it would be age seventy. After that period of time what did you expect you would be doing?

A. That would be hard telling.

Q. Well, I mean, did you expect to be doing night relief work?

A. Yes. I'd be standing night watches if I could get them.

Q. How many do you think you would get or can you tell with any——

A. You can't tell how many nights. It just depends on how many ships are in port and how shipping is. Shipping is sometimes good and sometimes shipping is bad.

Mr. Williams: You may examine.

#### Cross Examination

Q. (By Mr. Krause): Do you know of any second assistant engineers that are over sixty-five years old on a job? [397]

A. Right offhand I couldn't say. But, there is engineers over sixty-five years old that is working.

Q. Second assistants?

(Testimony of John Farley.)

A. There is second assistants but I couldn't tell—you can go up—well——

Q. Well——

A. Just a minute. You can go up to the Shipping Commissioner and look in the articles that they have there, you can find out the ages of the second assistant engineers. I don't know that but I know there is engineers that come aboard that is old.

Q. Now, Mr. Farley, you know that the chief engineer sometimes is an older man on a ship?

A. Yes, sir.

Q. But, the chief engineer is usually older than the second and third assistant, isn't he?

A. Sometimes.

Q. Yes. The third assistant that was on the ship with you was this young Zaleski that testified here in this case, wasn't he?

A. Yes, sir.

Q. And, usually the second and third assistants are quite young men, aren't they?

A. Well, some of them have seven and eight issues of licenses, some of them. [398]

Q. Some of them have seven or eight issues of license?

A. Yes, sir.

Q. I asked you what was usually the case. Aren't they usually young men?

A. They're usually young men, yes, sir.

Q. That's right. Mr. Farley, was there anything there on this night that you got hurt to prevent you from seeing what was going on on the Jacob's ladder?

(Testimony of John Farley.)

A. I don't get just what you mean now.

Q. Well, was there anything to prevent you from seeing what was on the Jacob's ladder?

A. If I would have looked I could have looked up above. There is a light up above and I could have looked up above, I could maybe seen the Jacob's ladder if I would have looked up above.

Q. What prevented you from seeing a man climbing on the Jacob's ladder up toward the top of the ladder?      A. What prevented what?

Q. Was there anything to prevent you from seeing what was on the ladder?

A. I didn't look at the ladder.

Q. I know it. But, what I am asking you, was there a wall between you and this ladder?

A. No, sir.

Q. There was nothing between you and the ladder, was there? [399]

A. No, sir. No, sir.

Q. So, if you had looked you would have seen the man on the ladder and what he was carrying?

A. If I would have looked I would have seen it, yes.

Mr. Krause: Very well. That's all.

### Redirect Examination

Q. (By Mr. Williams): Mr. Farley, you can't say whether you would have seen what he was carrying very well, can you, unless he was carrying it in a manner in which it was exposed to you? Isn't that true?



(Testimony of John Farley.)

A. If I would have taken a look at a man—if I seen a man that had a package in his hand, or something like that, I would have seen a package. But, what is in the package, or anything like that, I wouldn't know.

Mr. Krause: No.

Q. (By Mr. Williams): Mr. Farley, when you were looking up—if you had looked up from there you would have been looking right directly into a light, wouldn't you, a floodlight shining down?

A. You would look into a light all right. I have never had any—much experience with Jacob's ladders and coming aboard and going in them so I couldn't say exactly what is what.

Q. Was there a lot of light on the launch or was most of the light—— [400]

A. There is no light down at the launch at all except a little bit of a running light. They have a red light and a blue light, little running lights. They have little lanterns. They have little lights. They have on them launches, little kerosene lamps. Sometimes they just have little white lamps on there, just a kerosene light they have on there. That's all the light I could see down below. It's kind of dark down there.

Q. Well, was it lighted down below or was it dark, in general, if you know?

A. Kind of hazy down there. Dark.

Q. The only light you had was that coming down from up above?

A. When you get up above—when you get up

(Testimony of John Farley.)

above close to the ladder the light shines right close to it—your ladder, right out towards the side of the ship. It don't point down to the bottom of the end of it into your boat or into your launch.

Mr. Williams: No further questions.

Mr. Krause: I have nothing further.

The Court: That's all, sir. You may step down.

Mr. Williams: Your Honor, I would like to move the introduction into evidence of Libelant's Exhibit Number 3, report of William J. Accurso, [401] United States Coast Guard, dated August 21, 1952.

The Court: What is the number of that?

Mr. Williams: Exhibit Number 3, your Honor.

The Court: 3. What is your position about it, Mr. Krause?

Mr. Krause: Well, your Honor, the captain's deposition was taken. This statement was not presented to him. It isn't evidence in itself. It would appear that it was supposed to be contradictory of the captain's testimony and nothing has been pointed out to him or me on that point. I do notice a conclusion, a plain conclusion as to whether there was negligence or fault on the part of anyone. I don't think that that is admissible in evidence here since that is a question the Court is going to decide and isn't a factual statement that a witness under those circumstances would be permitted to give. There is no evidence here that the captain saw this accident, therefore, every bit of it would be hearsay as far as he is concerned. That is, the

deposition indicates he did not see the accident. And, therefore, I can't understand on what basis that would be admissible here.

Mr. Williams: Your Honor, this, of course, is a Government record duly authenticated as such required by law to be made whenever there is an accident involving injury to a man. The captain [402] is the representative of the vessel and as such he is the vessel in absence of its owners and he alone has the power to make admissions or denials or statements concerning liability. I think that is well understood maritime law.

The Court: All right. Now, assuming for the sake of argument that this is a report of the master of the vessel involved which he was under obligation to make and to file. You remember, Mr. Krause, we had a very similar situation as this in the fire case in Eugene. I don't know if you heard about that or not. It is very similar to the situation of where a birth certificate is filed by doctor and he states the facts as to the time, date of birth, weight of the registry, and then he makes a statement as he did at one time that the child was either legitimate or illegitimate. It is my recollection that it was involved in my search. And that was one of the questions in the fire case. There was this situation: the fire warden was under obligation under the State law to make a report of his investigation concerning forest fires, and one of the findings very similar to this was injury due to negligence. And, that is a conclusion, that is a finding that this officer was to make from what investigation he made.

Under the State Fire Marshal's law he is to make a showing as to what damage was incurred by the fire. In [403] this case the plaintiff is suing for about a quarter of a million dollars and the defendants came in where the State forester had made the conclusion of fifty or sixty thousand dollars damage to burned-over land.

Now, I hold that that is completely analogous to this situation here. Assume for the sake of argument that the Master was under obligation by law to make such a report. In my search at that time I was convinced that was not prima-facie evidence of the conclusion therein stated. So, I will be consistent in my own mind, anyway, and I will reject the offer.

Mr. Williams: All right, your Honor.

The Court: Now, that is upon the idea that it is not a statement of fact but a conclusion.

Mr. Williams: Your Honor, I offer it for the purposes of impeachment also.

The Court: I understand. Now, I will hear you. It has been asserted by counsel that the witness in his examination was not given the opportunity to answer this.

Mr. Williams: Of course, it was not in possession of us at that time, didn't even know it was required as an exhibit.

The Court: Well, I think he was entitled to have it. Either that or at a later time. Now, let me ask you this: is there some statement other than the conclusion that we [404] have been talking about in this statement that you claim, some stated fact, in other words?



Mr. Williams: May I see it for a moment? I believe there may be. No, I think not, your Honor.

The Court: That is the whole thing?

Mr. Williams: That's the whole thing.

The Court: All right. I will stand on the ruling.

[See page 453.]

Mr. Williams: Very well, sir. That completes our rebuttal. [405]

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[Endorsed]: Filed Jan. 14, 1957.

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LIBELANT'S EXHIBIT No. 1

DEPOSITION OF MALCOM EDWARD POTTS

\* \* \* \* \*

MALCOM EDWARD POTTS

produced as a witness herein on behalf of the Libelant, being first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

Q. (By Mr. Williams): Will you state your name, please?      A. Malcom Edward Potts.

Q. What is your present address?

A. 208 East 31st.

Q. What city is that in?

A. Los Angeles, California.

Q. And that is your home address?

A. Yes.

Q. And is that your permanent mailing address, also?      A. Yes.

Q. By whom are you employed at the present moment?

(Deposition of Malcom Edward Potts.)

A. Lincoln-Mercury Assembly Plant.

Q. Is that in Los Angeles?

A. In Maywood.

Q. In Maywood? A. Yes.

Q. That is just on the edge of Los Angeles?

A. Yes, it is a little suburb, a suburb in the city.

Q. And how long have you been employed by them? [4] A. A year and a half.

Q. Do you know where you will be within the next six months? A. Well, I assume here.

Q. Do you have any plans to be in the vicinity of Portland, Oregon, within the next six months?

A. No, sir.

Q. Or within a hundred-mile radius of it?

A. No, sir.

Q. You expect that you will be here in Los Angeles? A. That is right.

Q. Are you married, Mr. Potts? A. Yes.

Q. And you have children? A. Yes.

Q. How many? A. Two.

Q. Were you formerly employed aboard the SS Augustin Daly? A. Yes.

Q. Do you know about when that was?

A. That was in February of 1952.

Q. That is when you became employed by them?

A. Yes.

Q. And what was your job aboard the Augustin Daly? [5] A. Assistant cook.

Q. How many times had you gone to sea previous to that voyage? A. None.

Q. That was your first voyage at sea?

(Deposition of Malcom Edward Potts.)

A. Yes.

Q. What sort of license did you have to procure in order to go to sea?

A. Seaman papers.

Q. Seaman papers?

A. Yes.

Q. Did you have to pass any particular examinations to procure them?

A. Not that I know of. No, I didn't pass any examinations.

Q. You were in the Navy previous to that?

A. Yes.

Q. But were you at sea while you were in the Navy?

A. No.

Q. All your duty was shore duty?

A. That is right.

Q. And have you shipped since that voyage?

A. No.

Q. You have not been to sea since?

A. No. [6]

Q. Did you sign articles aboard the Augustin Daly sometime in the month of February, 1952?

A. Let me see. It was either in February or the month after, I can't say exactly.

Q. Where did you sign the articles?

A. In Portland.

Q. And from where did you leave?

A. Portland.

Q. Portland, Oregon?

A. Yes.

Q. And when you left Portland, Oregon, where did you go?

A. Went down to Coos Bay. You mean on the ship?

(Deposition of Malcom Edward Potts.)

Q. Yes. Where did you then ship? A. Go?

Q. Yes.

A. You mean after, or before signing my articles?

Q. When you signed articles, was that for a foreign voyage?

A. Yes, I imagine it was, because we didn't come back to go overseas.

Q. When did you leave to go overseas, did you depart from Portland, Oregon? A. Yes.

Q. And when was that, approximately? [7]

A. I can't remember exactly when it was.

Q. Would it be either in late February or early March?

A. Yes, either one. I don't know. It was either late February or early March.

Q. And where did you go when you left?

A. To go overseas?

Q. Yes. A. We went to Sasebo.

Q. You went to Sasebo? A. Yes.

Q. Japan? A. Japan, yes.

Q. And about how many days were you in going over there?

A. I would say about 27, 28 days, something like that. It was almost a month.

Q. Do you know the date of your arrival in Sasebo, offhand?

A. I believe it was April 2nd.

Q. And that was the first foreign port that you went to? A. Yes.

Q. And do you recall whether or not you had shore liberty at that port? A. Yes. [8]



(Deposition of Malcom Edward Potts.)

Q. Did you go ashore? A. Yes.

Q. What means of ingress and egress was there from the vessel, that is, what means of leaving the vessel was supplied by the vessel for crew members?

A. Well, you mean insofar as the landing, or as to the boat?

Q. Yes, in what form of appliance or device which was used to permit crew members to get off the boat onto a launch to go ashore?

A. On that particular day we used a Jacob's ladder.

Q. A Jacob's ladder? A. Yes.

Q. That is also known as a pilot's ladder, is it not?

A. I don't know. I just know it as a Jacob's ladder. I know the pilots use it.

Q. What date did you go ashore, if you know?

A. Well, I thought I went ashore—I am not sure about what date it was that we went ashore.

Q. Do you recall an injury that occurred to Mr. John Farley, who was the second assistant engineer aboard the SS Augustin Daly? A. Yes.

Q. With relation to that injury, what date did you go to shore? [9]

A. It was the first night that we went to go ashore.

Q. I mean in relation to the day that Mr. Farley was injured. Did you go ashore several times before that, or is that the only time you went ashore?

A. That is the only time I went ashore.

Q. And you don't know what date that was?

(Deposition of Malcom Edward Potts.)

A. No. I can't think offhand what date it was.

Mr. Williams: I believe Counsel will stipulate with me that Mr. Farley went ashore on the 5th and was injured shortly after midnight on the 6th. Is that correct, Counsel?

Mr. Kennedy: Yes, shortly after midnight of the 5th, if I remember correctly; I would be willing to stipulate that the accident happened approximately on or about 0040 April 6, 1952, which would be just shortly after midnight on April 5th.

Mr. Williams: So it would be on April 6th.

Mr. Kennedy: Yes.

Mr. Williams: That is 40 minutes after midnight, on April 6th.

Mr. Kennedy: Yes. I would be willing to stipulate that it was on or about that time.

Q. (By Mr. Williams): Now, that is the time that you went ashore and returned, is it not?

A. Yes.

Q. And that date has been established to be April 5th, [10] and April 6th when you returned?

Will you describe, if you can remember, how the Jacob's ladder that you refer to was fixed to the vessel?

A. Well, from what I can remember, I thought it was fixed on the main deck, and outside of that, all I know, at least I figured it was secured to the main deck, though I could be wrong about that.

Q. Your recollection of that matter is not too clear? A. No.

Q. Is that your answer?

(Deposition of Maleom Edward Potts.)

A. That is it. It is not too clear.

Q. And was that the only means of leaving the ship which was employed on that date?

A. Yes.

Q. That was available to you? A. Yes.

Q. Was an accommodation ladder used to provide ingress and egress on that date? A. No.

Q. It was not? A. No.

Q. It was not in use?

A. It was not in use, no.

Q. Was it in use insofar as you know at the harbor of Sasebo, Japan, at any time during that particular time [11] that you referred to?

A. I can't remember.

Q. You cannot recall? A. No.

Q. Do you know Mr. John Farley, second assistant engineer, aboard the *Augustin Daly*? Would you recognize him?

A. I believe I would.

Q. You know who he is? A. Yes.

Q. You had met him? A. Yes.

Q. Previous to this time? A. Yes.

Q. And when you went ashore, that was on about what time of the day, on April 5th?

A. I would say about 6:00 o'clock, around 6:00 o'clock.

Q. Was it in the morning or in the afternoon?

A. Afternoon.

Q. In the afternoon. And did you go down the Jacob's ladder to get in the launch?

A. Yes, sir.

(Deposition of Malcom Edward Potts.)

Q. Is that how you got ashore? A. Yes.

Q. And how many other men from the ship's crew went ashore at that time, if you know, approximately? [12]

A. I would say about 10, 15 men went ashore with us.

Q. Was Mr. Farley among those men, if you know, if you remember?

A. I am not certain. I don't remember.

Q. Then you got on the launch. Was that provided by the ship?

A. From what I understand, yes.

Q. And that launch took you ashore?

A. Yes.

Q. And did you arrive at a dock ashore?

A. Yes.

Q. And would you then state what you did after that?

A. Well, after that we went into a bar there on the waterfront.

Q. When you say "we," whom do you mean, Mr. Potts?

A. A friend of mine that were in the ship there, a couple of fellows that I ran around with on the ship, and we went into the bar and had a couple of drinks.

Q. Which bar was that?

A. You mean the name of the bar?

Q. No, no. Where was it?

A. Oh, on the dock.

Q. Right where the dock was?



(Deposition of Malcom Edward Potts.)

A. Yes, where we come off the ship and launch, and walked up a few paces and the bar was there, and I had a few [13] drinks there. And then we left there and went and got a haircut; after the haircut walked around a bit, and then went up to some houses, ladies' houses, women's houses, and after that we left and went back to the ship; which then the accident occurred.

Q. Now, during the time you were ashore, when you were in the first bar, Mr. Potts, how many drinks would you say you had?

A. Well, I'll say that I had a couple of whis-kies, glasses of whisky there, and maybe about one or two bottles of beer.

Q. Incidentally, how old are you, Mr. Potts?

A. Thirty.

Q. You were twenty-eight or twenty-seven at that time?

A. Let me see. I must have been twenty-eight. I just turned twenty-eight.

Q. And did you have anything else to drink after that time, and before you got on the launch to go back to the ship? A. Yes.

Q. What did you have to drink?

A. More whisky and beer.

Q. At other bars?

A. No, not at any other bars.

Q. Did you buy a bottle? [14] A. Yes.

Q. And do you know about how many drinks you took out of the bottle, roughly?

A. I would say roughly a couple.

(Deposition of Malcom Edward Potts.)

Q. And then you returned to the dock where the launch was to pick you up? A. Yes.

Q. And about how many men went back at that time?

A. Oh, I don't know exactly how many men. All I remember seeing was just the ones that were there at the accident. Now, whether there were any more near there or not, I couldn't say for sure.

Q. Would you say about the same number of men who went in came back at that time?

A. No.

Mr. Kennedy: I object to that on the ground it is leading.

Mr. Williams: Very well. I will withdraw the question.

Q. You have stated that as far as you know, approximately 10 or 15 men, you think, went ashore in the launch. A. Yes.

Q. Can you tell me approximately how many men came back in the launch, to the best of your recollection? Approximately.

A. Like I said, I only remember the ones that were [15] there at the time of the accident. Now, how many were in the boat, I can't recall.

Q. Was Mr. Farley among those on the boat returning? By Mr. Farley I mean the second assistant engineer on the Augustin Daly. A. Yes.

Q. Will you describe the launch in which you returned to the ship, as to how long it was, approximately?

A. I would say approximately 25 feet.

(Deposition of Malcom Edward Potts.)

Q. And about how wide would you say the launch was?

A. Oh, about 10 or 12 feet wide, I guess, something like that.

Q. And was it an open cockpit, or was it covered?

A. Well, where we was, was covered.

Q. Then, the passengers, the crew members, rode in a covered portion?

A. Yes.

Q. Inside of a cabin of some sort?

A. Yes, it was covered over.

Q. Was this cabin open on one or more sides?

A. It was open on each end.

Q. On each end. And about how long would you say the cabin was?

A. Oh, let's see. It was a little shorter; about eight or nine feet, I guess, something like that. [16]

Q. And did you sit down inside there on benches or something like that?

A. Yes, sat on benches inside there.

Q. About what time did you leave Sasebo, the dock there, to return to the ship, would you say?

A. Gee, I don't know. Let's see. I thought that the boat was scheduled to go back around 11 o'clock, and I thought we had only sat there a short time. Of course, it could have been longer than I figured, and it only takes a very few minutes to get out there. So I don't know exactly what time it was we left there.

Q. During your trip on the boat, on the launch from the shore to the ship, will you describe what

(Deposition of Malcom Edward Potts.)

your condition was with relation to your sobriety or soberness; were you sober or were you intoxicated, and if so, describe it.

A. Well, no, I wouldn't say that I was very sober, not absolutely sober, although I wasn't overly drunk, either. I mean I had had a few drinks, and I knew what I was doing. I was aware of myself at that time.

Q. Were you stumbling or falling down?

A. No, sir.

Q. Were you singing or making a great deal of noise on the way back?      A. No, sir.

Q. Were the men with you doing that? [17]

A. Yes, if I can remember correctly, but I can't remember exactly whether he was or not.

Q. Whether somebody was singing?

A. Yes.

Q. Or whether what?

A. Or whether they were making a loud noise. I know it wasn't dead quiet.

Q. (By Mr. Kennedy): You know it wasn't dead quiet, is that what you said?      A. Yes.

Q. (By Mr. Williams): And you were with some friends, you were grouped together, is that correct, on the launch going back?

A. Well, not exactly a group. I mean everybody was just sitting in it.

Q. Where were you sitting on the launch?

A. I am not sure about where I was sitting, but I believe, I think I was sitting forward of the boat.

Q. Were you sitting next to Mr. Farley, or do



(Deposition of Malcom Edward Potts.)

you know?           A. I don't know.

Q. You don't know where he sat with relation to you?           A. No, sir.

Q. Did he talk to you on the way back?

A. Not that I know of, no.

Q. And when you arrived at the side of the ship, did [18] the launch stop there close to the position where the Jacob's ladder was fixed?           A. Yes.

Q. And what did you do at that time?

A. I went out and I believe—I am not sure about this, but my friend went up the ladder first and then I believe I proceeded to go up the ladder.

Q. You were the second man up the ladder?

A. Yes, I was the second man up the ladder.

Q. How did you leave the launch? I mean, you were in an enclosure, you said?           A. Yes.

Q. In sort of a cabin that was open on the two ends?           A. Yes.

Q. Did you go out the front end or from the back end?           A. I went out the front end.

Q. And was there a deck on the forward of the this launch?           A. Yes.

Q. On the bow of the launch?           A. Yes.

Q. And you stepped from there onto the Jacob's ladder?           A. Yes.

Q. About how far would the launch have been from the Jacob's ladder? [19]

A. Oh, it would have been right up on it, I imagine.

Q. Within a foot?           A. Yes, yes.

Q. And did other men come out there with you,

(Deposition of Malcom Edward Potts.)

at the time you came out to get on the Jacob's ladder?      A. Yes, I believe they did.

Q. Or did they stay inside, or do you know?

A. Well, I believe we filed out one by one, because it was too small for too many to come out all at once. That is the reason why I say I believe I was the second one up the ladder. I believe my friend went out first, and then I went out, and we went up the ladder then.

Q. And would you say that you were feeling good at this time?

A. By "feeling good," what do you refer to?

Q. I mean to say, were you, by reason of having had some alcoholic drink, feeling somewhat elated?

Mr. Kennedy: I object to that on the ground it is leading.

Mr. Williams: That is all right. I will withdraw the question.

Q. When you started up the Jacob's ladder, was there anything you were carrying, were you carrying anything?      A. Yes.

Q. What were you carrying? [20]

A. I had two bottles that I was carrying.

Q. Were those your own?

A. No, they were not mine. They were my friend's.

Q. You were taking them aboard for your friend?      A. Yes.

Q. Is that what you were doing?      A. Yes.

Q. And how were you carrying those bottles, were they wrapped in a sack?      A. No.

(Deposition of Malcom Edward Potts.)

Q. Or were they free, or what?

A. They were free, and if I can remember correctly, I had one in my right hand and one under my left shoulder—under my left arm.

Q. Holding it under your left arm?

A. Yes.

Q. So that when you went up the Jacob's ladder, which hand were you holding onto the Jacob's ladder with?

A. With both of them. Of course, I was using both hands going up and, well, with one bottle, it may have been a little awkward.

Mr. Kennedy: Will you read the question and answer?

(Record read by the Notary.)

Mr. Kennedy: Very well.

Mr. Williams: I will clarify it. [21]

Mr. Kennedy: Go ahead.

Q. (By Mr. Williams): Mr. Potts, you were holding a bottle how, by the neck? A. Yes.

Q. In your right hand, is that correct?

A. Yes, yes.

Q. And you weren't holding onto the Jacob's ladder with your fingers, then, is that correct, as you went up, with the fingers of your right hand?

A. Yes, I had the bottle and was gripping it, the bottle like this (illustrating), and sort of both, going up like that. Maybe I used two or three fingers going up.

Q. Of your right hand? A. Yes.

Q. And is it correct your left hand was free,

(Deposition of Malcom Edward Potts.)

excepting you had a bottle?           A. A bottle.

Q. Under your left arm?

A. That is right.

Q. And will you describe what happened as you went up the Jacob's ladder?

A. Well, I just went up the Jacob's ladder and when I got to the top, I went over, went to go over the rail there, or I was on top of the rail, and then instead of going forward I went backwards. [22]

Q. You simply fell?

A. Fell. That is all that I know about it.

Q. Did you slip on anything, or did you just fall?

A. I don't remember whether I slipped or whether I fell. All I know I was just by myself floating in air. That was all there was to it.

Q. Do you know how far you fell?

A. I would say about like off of a two-story building.

Q. By that height, what do you mean to indicate, you mean 15, 20, 25 feet, or about how far?

A. Twenty, twenty-five feet, I imagine, something like that.

Q. And on what did you land?

A. Well, I will say I landed on Mr. Farley, at least the way he was groaning and everything, I expect I landed on him.

Q. Did you land just on Mr. Farley or partly on other men also?

A. Well, as far as I know I landed on Mr. Farley, but the other men say I hit them, too.



(Deposition of Malcom Edward Potts.)

Mr. Kennedy: I move to strike that last portion. Is that agreeable?

Mr. Williams: You just put your motion in.

Mr. Kennedy: All right, I move to strike the last portion of the answer where he states that he heard or was [23] told he fell on other men, also, on the grounds that it is completely immaterial in this case and is not responsive to the question.

Q. (By Mr. Williams): Mr. Potts, what happened to the bottles that were in your hands, one in the right hand and one under your left arm, what happened to them as you fell?

A. Well, they fell to the deck below.

Q. To the deck of the launch?

A. Yes, and one of them busted.

Q. On the deck of the launch?

A. I guess so. All I can say is that it busted. I don't know whether it fell on anyone or not.

Q. What happened to the other one?

A. The other one, I still let go——

Q. Did you retrieve that? A. Yes.

Q. And then what did you do?

A. Proceeded to go up the Jacob's ladder.

Q. Did you take that bottle with you?

A. Yes.

Q. When you fell on the launch and fell, do you know that you fell on top of a man, are you sure of that? A. No, I am not sure.

Q. You don't know whether you hit the deck or hit a man or not, of your knowledge, do you? [24]

A. Of my own knowledge, no, I don't.

(Deposition of Malcom Edward Potts.)

Q. After you landed, did you remain in the same position up until the time you got up, that is to say, did you land at one point and then roll or fall someplace else, after you landed, if you know?

A. No.

Q. Or did you stay in the same place?

A. I believe I stayed in the same place, just got up from there.

Q. And when you got up from there, about how far back did you have to walk to get on the Jacob's ladder?

A. About two or three steps.

Q. Mr. Potts, do you recall whether or not there was any light fixed onto the vessel near, then, where the Jacob's ladder was fastened on?

A. Yes, there was light.

Q. There was some sort of light. Do you know what kind of light it was?

A. I am not sure. I think it was a big floodlight and then I think they had lights at the top of the mast and over one of the hatches that they had on there.

Q. And the lights you have described, did any of them shine down over the side of the ship, or were they mostly on the surface of the ship, on the deck?

A. They shined down, because when we got to the ship's [25] side, there was plenty of light there over the side of the ship.

Q. Could you see the Jacob's ladder as you were going up there, I mean could you see the steps?

A. Yes.

(Deposition of Malcom Edward Potts.)

Q. You had no difficulty in seeing the lights?

A. No, no difficulty in seeing the lights, no.

Q. Mr. Potts, did you receive any instructions from the captain of this vessel, the Augustin Daly, or from any other officer aboard the Augustin Daly, as to how to go up and down a Jacob's ladder?

A. No.

Q. During the voyage? A. No.

Q. You did not. This was the first port that the ship was in, from the time you left the United States? A. Yes.

Q. Now, you said that you had gone on this ship down to Coos Bay originally, is that correct?

A. Yes.

Q. And then returned to Portland?

A. Yes.

Q. Was the Jacob's ladder used, then, as a means of ingress and egress? A. No, sir. [26]

Q. Were you alongside a dock or were you using some other method?

A. No. We were alongside of the dock all the time.

Q. Then, this was the first time that the Jacob's ladder was used in respect to this vessel?

A. Yes.

Q. Was that the first time that you ever used a Jacob's ladder? A. Yes, it is.

Q. Mr. Potts, if you know, will you please state why you fell, if you know?

A. I don't know why I fell. I can't understand why I fell at all.

(Deposition of Malcom Edward Potts.)

Q. Did the fact that you had been drinking previously have a bearing on it?

Mr. Kennedy: Objected to on the ground that it is leading.

Mr. Williams: I will withdraw the question.

Q. State whether or not the fact that you had been drinking had a bearing on your fall from the Jacob's ladder.

Mr. Kennedy: I object to that, also, on the ground it is leading and also on the grounds that the witness has answered the question, and on the further ground that counsel is impeaching his own witness.

Mr. Williams: Your objection is in the record. [27] Will you please answer the question.

Mr. Kennedy: Read it back to him, please.

Mr. Williams: Read it back to him.

(Pending question read by the Notary.)

The Witness: I don't think so.

Q. (By Mr. Williams): You do not think so?

A. No.

Q. State whether or not your inexperience with the Jacob's ladder had a bearing on your fall from the Jacob's ladder at the time and place you have mentioned.

Mr. Kennedy: Just a moment. Will you read the question, please.

(Pending question read by the Notary.)

Mr. Kennedy: Objected to on the ground that it is leading and also on the grounds that the question



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has been previously answered and counsel is impeaching his own witness.

Mr. Williams: Now, will you please answer the question?

Read it to him.

Mr. Kennedy: Read it to him.

(Pending question read by the Notary.)

The Witness: No.

Q. (By Mr. Williams): That had no bearing on it? A. No bearing on it.

Q. Then, you are unable to state any factor or any particular cause of your fall? [28]

A. That is right.

Q. Mr. Potts, I believe you testified that when you first arrived at Sasebo you went to a small bar that was near the dock there, did you not?

A. Yes.

Q. And you said that while you were there, you had a couple of whiskies? A. Yes.

Q. Do you mean one-ounce shots, or about what size, how much do you think?

A. About a regular one-ounce shot, maybe, yes, a regular whisky glass.

Q. You bought that from the bar?

A. Yes.

Q. And you had also a couple of beers?

A. Probably. I won't say a couple, but I know I had one beer, because you get the large bottles, see, and I usually took a couple of bottles of those.

Q. How large bottles were those, pints or quarts, or in between?

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A. What size are our beer bottles? They are 12 ounces. They are a little larger than 12 ounces.

Q. After that did you buy a bottle, after that, for yourself? A. No, I didn't. [29]

Q. Did you have one with you? A. Yes.

Q. Did your friend buy it? A. Yes.

Q. And you took some drinks out of that, is that right?

Mr. Kennedy: That is objected to on the ground that that is leading.

Mr. Williams: He has already said that he did.

Q. Did you have any drinks out of the bottle that your friend bought? A. Yes.

Q. About how many do you think you had while you were in the town of Sasebo?

A. While I was in the town of Sasebo, I may have had one. I may have—I don't remember drinking any of it, though. I may have, but I can't remember.

Q. Did you stop in any other bar or at any other place where you bought more liquor? A. No.

Q. And when you returned to the dock, did you have a drink out of the bottle that you referred to there?

A. No. We didn't have the bottle there.

Q. When you were at the dock.

A. Yes. We didn't have it. We left it at the house [30] with the other fellow.

Q. When you got on the launch, did you have any drinks then?

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A. I may—I am not sure whether I had drinks then or not.

Q. Mr. Potts, at the time of your voyage on the *Augustin Daly*, did you drink fairly regularly or infrequently, or what were your drinking habits?

A. Infrequently, I would say.

Q. Did you normally have as much to drink when you drank as you did on this particular occasion?

A. I had more.

Q. You had more on this occasion than you did ordinarily?

A. No. I had more after that than I did on this occasion.

Q. Oh, I see. But up until that time——

A. Yes.

Q. ——did you normally, when you drank, drink as much as you did on this occasion?

A. I did not drink very much on that——

Q. Before then. A. Before then, no.

Mr. Kennedy: Just a minute. I am sorry, but I think the witness' words are being turned a little bit. I understood [31] him to answer that on other occasions he drank more than on this particular occasion, and that also, as far as any general or usual occurrence, that on other occasions he would normally drink more than he did on this occasion.

Mr. Williams: Counsel, I think you will find from the reporter's notes that the notes will indicate that his testimony was that subsequent to this time he did drink more, but not prior thereto.

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Will you please read back his answer so we can check that up, Mr. Reporter?

(Record read by the Notary.)

Mr. Kennedy: I don't think that is right. I don't think that is what his questions led up to. Go ahead. It doesn't matter. I can clear it up on cross examination, but I think his testimony is to the contrary.

Q. (By Mr. Williams): Mr. Potts, is it your testimony that prior to the occasion we have reference to, that when you drank you did not drink as much as you did, then, is that your testimony?

A. That is right.

Q. Up until that time? A. Yes.

Q. Have you seen Mr. Farley since the accident?

A. No.

Q. Did you have a conversation with the captain [32] following the accident? A. No.

Q. With any of the other officers or crew following the accident? A. No, sir.

Q. Relative to Mr. Farley's injury, I mean.

A. No, sir.

Q. Have you, since the date of the accident, had conversations with representatives of the respondent in this case, the United States of America, with regard to Mr. Farley's accident? A. Yes.

Q. With whom?

A. Let's see, an attorney came and they took a statement as to the accident.

Q. Was he an attorney representing the respondent, the United States of America, in this matter, if you know? A. I don't know.



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Q. Was he representing Mr. Farley, or did he tell you?

A. I believe he was for the United States, but when he first came to me, I did not know who he was representing.

Q. Didn't he disclose whom he was representing?

A. No. He may have, but maybe I have forgotten. He just came and told me what the situation was, and that he come down to get my statement on what had happened, and that [33] was about all.

Q. Was that here in Los Angeles?

A. Yes.

Q. Have you been contacted since that time by other representatives of the respondent, United States of America?

A. Only contacted me this morning.

Q. The contact this morning, that was by myself as attorney for Mr. Farley, was it not, Mr. Potts?

A. No, sir.

Mr. Kennedy: I talked to you this morning?

The Witness: Yes.

Mr. Kennedy: Isn't that right, Mr. Potts?

The Witness: Yes.

Q. (By Mr. Williams): Mr. Kennedy talked to you this morning? A. Yes.

Q. About what time?

A. Well, this—do you know the fellow's name? Becker.

Mr. Kennedy: Oh, Mr. Richardson, I believe, from Mr. Becker's office. He contacted you this

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morning. And you don't mind if I testify. I can testify what it was.

Mr. Williams: No. That is all right.

Mr. Kennedy: He contacted Mr. Potts this morning, at my request. [34]

Mr. Williams: At what time?

Mr. Kennedy: I don't know at what time. We had breakfast together, with Mr. Richardson, with Mr. Potts and myself, and at that time we discussed the accident, and I assume that thereafter you had some conversation with him.

Q. (By Mr. Williams): When did I call you, contact you, Mr. Potts? A. About 11:30.

Q. This morning? A. Yes.

Q. And I discussed the accident with you, also?

A. Yes.

Q. Did I not? A. Yes.

Q. Who is Mr. Richardson, Mr. Potts, if you know? A. He is a lawyer.

Q. Here in Los Angeles? A. Yes.

Mr. Kennedy: I can clarify that.

Mr. Williams: Well, I don't know.

Mr. Kennedy: I can clarify that. Mr. Richardson isn't a lawyer. He is a private investigator who works, I think, for Mr. Lillick's office down here, and we called down here so that I could arrange to talk with Mr. Potts, left specific instructions that no one, no investigator or [35] no other person would discuss this accident in any particular with Mr. Potts, and I thereafter discussed the facts of

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the accident with him. Now, if you want to ask Mr. Potts what I told him, go right ahead.

Q. (By Mr. Williams): What time were you contacted this morning, Mr. Potts, by Mr. Kennedy and Mr. Richardson?

A. Well, Mr. Kennedy called this morning about eight, I believe it was.

Mr. Kennedy: Excuse me. You do not mean Mr. Kennedy. You mean Mr. Richardson?

The Witness: I am sorry. Not Mr. Kennedy. Mr. Richardson, yes; and he picked me up about 8:30.

(Record read by the Notary.)

Mr. Kennedy: Yes, Mr. Richardson "picked me up about 8:30." Off the record.

(Discussion off the record.)

Mr. Williams: That is all, I believe.

### Cross Examination

Q. (By Mr. Kennedy): Mr. Potts, you testified that you were in the Navy during the war.

A. Yes.

Q. How long were you in the Navy?

A. Three years.

Q. Where were you generally stationed? [36]

A. Boston.

Q. You were stationed there almost all the time?

A. Yes.

Q. Did you go through boot training?

A. Yes.

Q. How long were you in boot training?

A. Eight weeks.

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Q. Now, I believe you also testified that before sailing, of course you obtained your sailing papers?

A. Yes.

Q. Did you obtain those through the Coast Guard? A. Yes.

Q. Did you also have to apply through any union? A. Yes.

Q. How did you actually get aboard that ship? Did you contact the steamship company or did you contact the union? A. The union.

Q. And did the union send you aboard the ship? A. Yes.

Q. What were you sailing as, as a permit man? A. Yes.

Q. Now, I don't know if I completely understood this. I think you might have answered it before:

Was it your testimony that it was your best [37] recollection that you went ashore about six at night before the accident? A. Yes.

Q. To the best of your recollection, it was about 6:00 o'clock, is that right? A. Yes.

Q. Then, I take it also by your direct examination you don't know for sure whether an accommodation ladder was used or not at other times while you were in the port, is that right, or am I wrong on that?

A. Well, I remember one occasion it was used.

Q. You mean at Sasebo?

A. No, not as Sasebo.

Q. I mean at Sasebo. A. Oh, no.



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Q. You just don't know, do you?

A. No, I don't remember.

Q. Did you go ashore with a group of friends of yours? A. Yes, two more friends of mine.

Q. Three of you altogether? A. Yes.

Q. Who were the two friends?

A. S. L. Johnson.

Q. And who was the other one?

A. The other one was—let's see, what was his name? I think it was John Goodry, that is his [38] last name, but I think his first name was John. They called him Goodry.

Q. G-o-o-d-r-y? A. I guess so.

Q. (By Mr. Kennedy): Have you any idea about what time you arrived at the dock, Mr. Potts?

A. Oh, I would say about maybe five or ten minutes later, after we left the ship.

Q. Now, this launch, do you know whose launch it was that had been used?

A. No. I don't know. It was a Japanese launch, but from what I understand, on which I could be wrong——

Mr. Kennedy: Well, excuse me, Mr. Potts.

The Witness: Yes.

Mr. Kennedy: If you know something from what somebody else told you, that is not admissible in a matter like this.

The Witness: I don't know whose launch it was, then.

Q. (By Mr. Kennedy): And I take it you don't

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know what arrangements were made by the company—— A. No.

Q. ——nor by anybody else, insofar as the launch was concerned? A. No.

Q. Now, I believe you also testified that you stopped at a little bar there just on the dock or close by the dock? [39] A. That is right.

Q. About what time did you leave there, to the best of your recollection?

A. Oh, about an hour or so, an hour and a half after we arrived in there.

Q. About what time would you say that took you up to, approximately?

A. Oh, I would say around 7:30 or 8:00 o'clock.

Q. What type of beer was that? Was that American beer or Japanese beer? A. Japanese beer.

Q. And what about the whisky?

A. The same.

Q. Japanese whisky? A. Japanese whisky.

Q. And from there, Mr. Potts, did you testify that you went uptown to get a haircut?

A. Yes.

Q. Were these other two fellows with you at that time? A. Yes.

Q. And did you get your haircut? A. Yes.

Q. About what time, approximately, would it be after you had finished getting your haircuts?

A. Oh, let me see; about 8:30 or 9:00 o'clock [40] maybe a little longer.

Q. Would you say maybe a little later?

A. Yes, maybe a little later, not much.

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Q. I take it you are not sure about these times.

A. No, sir.

Q. They are just your general recollection?

A. That is right.

Q. And after that, did you walk around town for a bit?

A. Yes.

Q. All three of you?

A. Yes.

Q. How long did you walk around town?

A. Oh, maybe half an hour to an hour, I would say.

Q. What were you doing, just general sight-seeing?

A. Yes, just general sight-seeing, looking around.

Q. Well, from there I believe you testified that you went up to some girls' house.

A. That is right.

Q. Were all three of you up there?

A. Yes.

Q. Did you have a bottle of whisky with you at that time?

A. Yes.

Q. Did you buy that whisky?

A. No. [41]

Q. Did you become separated at the girls' house?

A. Yes.

Q. Were you with the whisky?

A. No.

Q. Or did your friends have the whisky?

A. No; I didn't have the whisky. They had the whisky.

Q. Incidentally, Mr. Potts, did you have to be back aboard the ship in the morning?

A. No, I didn't.

Q. And why was that?

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A. Well, it was an incident that happened, that started in Portland. You see, our chief cook—the steward has the say-so of the liberty, so he left it up to the chief cook as to the liberty that the three cooks would have, so in Portland it seems as though the chief cook and the second cook were going ashore off and on all the time while I was working, so during the voyage over, I put up a squawk about it and the chief cook said that I could have the **first** night or the first day off when we reached port.

Q. Well, did you have the following day off, then?      A. Yes.

Q. In other words, you didn't have to report for work——      A. In the morning.

Q. In the morning?      A. That is right. [42]

Q. Did you have to come back aboard on that 12:00 o'clock boat?      A. No.

Q. You could have come back in the morning?

A. That is right.

Q. Now, about when did you leave this house that you testified to, to the best of your recollection?

A. To the best of my knowledge, I will say it was close around eleven.

Q. Did your other two friends leave with you?

A. No. Only one.

Q. Only one?      A. Yes.

Q. Did he have duty the next day?

A. Yes.

Q. Let me ask you this, Mr. Potts: Did you want to go back aboard the ship at midnight?



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A. Well, it was more or less immaterial, because I didn't have to go back if I didn't want to.

Q. But your friend did have to go back, is that right?

A. Well, he didn't have to go back that night. He could have waited and chartered a boat in the morning and went out on it.

Q. Did he have duty in the morning?

A. Yes. [43]

Q. What time would he have to be on watch?

A. Six o'clock.

Q. What was the condition of your friend at the time you left this house, as far as his sobriety or relative to intoxication?

A. Well, I would say that he was a bit intoxicated.

Q. He was a bit intoxicated? A. Yes.

Mr. Williams: Just a moment. I wish you would indicate by "friend" who you mean, because he indicated two men.

The Witness: Oh, S. L. Johnson.

Q. (By Mr. Kennedy): Mr. Johnson was the one who left with you? A. Yes.

Q. And you say he was intoxicated?

A. Yes.

Q. Well, of course, intoxication is a relative thing. Was he singing or stumbling or anything like that?

A. Well, no. He wasn't singing or stumbling or anything. But when you are with a fellow, you know just about how much they can take.

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Q. Well, would you say that he had about reached his limit or not?

A. Well, no. He could go a few more, I guess.

Q. I see. Now, I believe you testified that [44] you then went back down to the dock.

A. Yes.

Q. Is that right?           A. That is right.

Q. And did your friend buy some whisky there?

A. Yes.

Q. Was it your friend who bought the two bottles of whisky?           A. Yes.

Mr. Williams: When you say "friend," you mean S. L. Johnson?

The Witness: Yes.

Q. (By Mr. Kennedy): Then, did both of you then board the boat?           A. Yes.

Q. The launch, rather?           A. Yes.

Q. And how long were you aboard the launch before it actually sailed for the vessel?

A. I don't know just how long it was. Ten, fifteen minutes. Maybe more. I couldn't actually say how long it was.

Q. And on the way back, was Mr. Johnson doing any singing or being a little bit playful, or anything along that line? [45]

A. I can't remember whether he was being playful or not on that particular trip.

Q. Why do you say on that particular trip, Mr. Potts?

A. Well, I can remember other occasions where

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he might have been playful, you know, talking with the men, drinking and stuff like that.

Q. Then, he does under certain circumstances get into sort of a playful spirit? A. Yes.

Q. But I take it you can't remember specifically in this case whether he was singing or being particularly playful, or do you?

A. No, I don't remember.

Q. Now, Mr. Potts, you also testified about the dimensions of the launch. Are you very certain about those, or is that just sort of your general recollection?

A. Just my general recollection. I am not certain about it at all.

Q. I don't know if I quite understood. Does that launch have what you would call a midship house?

A. Well, there are launches—at least that launch was built, like I say, 25 feet, and the cabin where the men sit was sort of oblong around that way.

Q. Well, did that go back on the stern?

A. Yes, it went clear to the stern. It didn't [46] cover the stern. It would cut off, say about, oh, about four foot from the stern of the ship, something like that.

Q. It just provided a covering, is that right?

A. No. It didn't provide a covering back there from four foot up to—maybe it had a little more bow to it than the stern.

Q. Now, I also recall—I am not sure whether I got that testimony correctly or not, but I believe on the tail end of one of your answers you said it

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was not dead quiet on the boat? Am I right about that, Mr. Williams?      A. Yes, I will say that.

Mr. Williams: I believe he said it was not dead quiet on the boat.

Q. (By Mr. Kennedy): It was not dead quiet?

A. Yes, it was not dead quiet.

Q. It was not dead quiet?      A. Yes.

Q. Now, do you know where you were sitting on the boat, Mr. Potts?

A. I can't say for sure where I was sitting.

Q. I believe you testified that you thought that you were sitting forward.      A. Yes.

Q. I mean, do you know, or is your recollection very clear about where you were sitting? [47]

A. No. It is not clear.

Q. I realize that this accident happened quite a while ago.

A. Yes. It is not clear at all.

Q. Were you with Mr. Johnson all the time?

A. Yes.

Q. Coming back in the boat?      A. Yes.

Q. Were you carrying the whisky bottle at that time?      A. Yes. You mean on the launch?

Q. While you were on the launch, or do you remember?

A. I don't remember whether I had it, then, or not.

Q. Was there any reason, Mr. Potts, why you carried those bottles of whisky up the Jacob's ladder?

A. Yes. We debated there about going up the



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ladder, he and I and I thought I was in better condition to carry it than he was.

Q. He was a little high? A. Yes.

Q. But they were his bottles? A. Yes.

Q. Now, I am not sure if my recollection is fairly correct on this or not:

Did you testify that you had one of the bottles in your right hand? [48] A. Yes.

Q. And one under your left arm? A. Yes.

Q. Did you have part of your right hand free to grasp the Jacob's ladder?

A. Not my hand. My fingers.

Q. Your fingers? A. Yes.

Q. You were holding the bottle with some of your fingers? A. Yes.

Q. And grasping the Jacob's ladder?

A. With the others.

Q. Your free fingers? A. That is right.

Q. Did you have any particular difficulty in climbing the ladder?

A. No. It didn't seem like any difficulty to me.

Q. How tall are you, Mr. Potts?

A. About five, nine and a half.

Q. And what do you weigh?

A. About 155, 156.

Q. Did you ever engage in any athletics?

A. I did. I do now, yes, from time to time.

Q. What do you do? [49]

A. Well, now, I play baseball and occasionally a little football with the kids, or something like that.

Q. Any sports while you were in school?

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A. Yes, yes. I ran track while I was in school.

Q. Now, where were you on the Jacob's ladder, Mr. Potts, if you remember, when you fell?

A. I was at the top.

Q. Did you have a leg over?

A. I can't remember whether I had a leg over or whether I was standing on top of the rail.

Q. Is there some possibility you might have been standing up and going over? A. Yes.

Q. Now, I believe you testified that you just fell off into air and that you may have slipped or just fell, something to that effect? A. Yes.

Q. Now, do you recall that you slipped, Mr. Potts, or do you have any recollection about that?

A. I don't have any recollection of it.

Q. Well, what I am getting at is, was there any foreign substance like a banana peel or grease or anything like that?

A. No. If I did slip, the only thing I could say like I say, I don't know whether I had my leg over or whether [50] I was standing up on top of the rail or what. The only thing, if I slipped, it might have been on the rail there, that I might have slipped off of that.

Q. That is just a guess on your part?

A. Yes, that is just a guess on my part.

Q. Mr. Potts, I believe you also testified you are not sure whether you had a drink or not on the launch. Did your friend have a drink on the launch, if you know?

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A. I don't know. I can't remember whether he did or not.

Q. Also there was a lot of testimony, and some argument between Mr. Williams and I about drinking before the accident or after the accident and at the time of the accident.

Let me ask you this, do you consider that you drink quite frequently? A. Do I consider it?

Q. Yes. A. No, I don't.

Q. What would your testimony be with respect to whether on other occasions when you were drinking, whether you would drink more on other occasions than you did at the time of this accident? Now, do you understand me? A. No, I don't.

Q. Well, here is what I mean: We have got [51] occasions maybe before this accident——

A. Yes.

Q. ——that you might have been drinking, and we might have other occasions when you might have been drinking. Now, on those other occasions, just generally would you say you drank more at that time than you did the night of the accident, or less?

A. I would say I drank more.

Q. You drank more at other times than you did at the time of this accident?

A. That is right, yes.

Mr. Kennedy: I am sorry. That is sort of a confusing question.

Mr. Williams: So far as I am concerned, it is very confusing. You have tied in before and after-

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wards together, so it is now grossly confusing. I can redirect.

Q. (By Mr. Kennedy): Now, Mr. Potts, I discussed this accident with you this morning, didn't I?

A. Yes.

Q. And you have also discussed it with Mr. Williams, haven't you?      A. Yes.

Q. Now, at that time I believe I told you that there was no secret or mystery about this, and that it was perfectly all right to tell Mr. Williams [52] that I had talked to you, or anything like that; am I right on this?      A. Yes, sir, that is right.

Mr. Williams: That is objected to as immaterial and for the further reason that the question is not proper cross examination, because it was not covered on direct.

Mr. Kennedy: Because it was not covered on direct?

Mr. Williams: Yes. Not that question, not what you told him.

Mr. Kennedy: I am sorry, Mr. Williams, but you went into detail.

For the record, Mr. Williams, I don't want to have any impression in this deposition that Mr. Potts was instructed what to say or that there was anything like that.

Mr. Williams: In response to that, Counsel, there is no such impression created by the record as it now stands, and I do not see any reason to go into it further. Such a question has not been asked nor has it been raised even inferentially.



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Mr. Kennedy: Let us leave it like this: I think that the record should show that we both had an opportunity——

Mr. Williams: And availed ourselves of the opportunity.

Mr. Kennedy: ——had an opportunity and availed ourselves of the opportunity to discuss this accident with Mr. Potts, and that is the extent of it.

Mr. Williams: And that is all the record shows, up to [53] now.

(By agreement of counsel, then followed discussion off the record.)

(Record read by the Notary.)

Q. (By Mr. Kennedy): Mr. Potts, I wonder if you would describe the condition of this Jacob's ladder, as far as you can recall?

A. As far as I can recall, it was in good shape, there wasn't anything wrong with it so far as I know about that.

Q. I believe you also testified that you knew Mr. Farley or had seen him aboard the ship, is that right?\_

A. That is right.

Q. Did you come into contact with him very much?

A. Not too much, no.

Q. Did you ever observe him in his work?

A. No, sir.

Q. How did he get around on board the ship?

A. All right.

Mr. Kennedy: I believe that is all.

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Redirect Examination

Q. (By Mr. Williams): Mr. Potts, did you state—what do you weigh now?

A. About 155, I believe.

Q. What did you weigh at the time of the accident? [54]

A. I think at the time of the accident I must have weighed about 160, something around there, a little heavier than I am now.

Q. Do you know where Mr. S. L. Johnson is at the present time? A. No, I don't.

Q. Do you know where he lives when he is in the United States? A. His home is in Frisco.

Q. In San Francisco?

A. Yes. I did have his address, but I don't know whether I could find it now or not.

Q. Have you seen him since the accident?

A. Well, we came back together and I stopped at his home.

Q. But I mean after your ship returned to the United States. A. No.

Q. Does he follow the life of a seaman pretty much? I mean, is that what he does regularly?

A. Well, he shipped before, but this was his first union ship that he had been on. He had been in the MSTs before.

Q. What I am getting at is, is he shipping now, as far as you know? [55]

A. As far as I know, I don't know.

Q. Oh, you don't. A. No.

Q. You don't know what he is doing, now?

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A. Yes, sir.

Q. He is a cook?

A. No, sir. He was a messman on there.

Q. A messman?           A. Yes.

Q. Mr. Potts, do you know if Japanese beer is the same alcoholic strength as American beer?

A. No, I don't.

Q. You don't know if it is stronger or weaker?

A. No, I don't.

Q. What about Japanese whisky, do you know about that, the Japanese whisky that you drank, is that stronger or weaker than American whisky, or do you know?           A. I don't know.

Q. Did you know that ship was going to sail on the 6th of April?           A. No.

Q. You did not know. You know, now, that it did leave on the 6th of April, the day of Mr. Farley's injury, don't you, or do you?

A. No, I didn't know it. [56]

Q. You didn't know that?

A. No, sir. I thought we went ashore there after that.

Q. Your recollection is that you went ashore after his injury?           A. Yes.

Q. That the ship stayed there for some time?

A. Yes.

Q. You recall that very clearly one way or the other on that?

A. No, I can't recall it clearly.

Q. But that is the impression you have?

(Deposition of Malcom Edward Potts.)

A. Yes, the impression I have, that accident happened on the first night we went ashore.

Q. The first night you went ashore?

A. Yes.

Q. Do you know where you got on the ladder to go down to the launch when you were going ashore?

A. No. I can't remember.

Q. You don't know if you got on at the main deck or at the boat deck?

A. Oh, it was off the main deck.

Q. You got on someplace at the main deck?

A. Yes.

Q. Do you recall clearly where the Jacob's ladder [57] was affixed?      A. No, I don't.

Q. Could it have been affixed to the pipe rail, on the boat deck?      A. It could have been.

Q. One deck above the main deck?

A. I don't know. I don't remember that.

Q. But you know that you got on the Jacob's ladder at the main deck?      A. Yes.

Q. When you went down to go ashore?

A. Yes.

Q. And when you returned from ashore——

Mr. Kennedy: Excuse me. You are starting in to lead a little bit.

Q. (By Mr. Williams): And when you returned from ashore, do you know if the Jacob's ladder was affixed the same way as it was when you went to shore?      A. I do not.

Q. You don't.      A. No, sir.

Q. Do you know when you went up the Jacob's



(Deposition of Malcom Edward Potts.)

ladder whether or not as you reached the main deck, you had to step around the side of it to get off onto the main deck?

A. No, I don't remember that. [58]

Q. You don't remember?

A. Whether I had to step around the side or not.

Q. You don't know whether—— A. Yes.

Q. How much space would you say there was on the launch from between the cabin which was on the liberty launch and the side of the vessel of the liberty launch, was there a wide space there, or was there no space there?

A. There was a little space, not much. You mean between the cabin and the——

Q. And the edge.

A. And the edge of the boat?

Q. Right.

A. Yes, there was a little space, not much.

Q. Could you walk around there? A. Yes.

Q. You could? A. Yes.

Q. Is that the way you went or the other members of the crew went? A. No.

Q. You all went out of the front?

A. As far as I know, yes.

Q. Well, if you had gone out of the rear, you would have had to walk around the edge, would you not? [59] A. That is right.

Q. And the liberty launch pulled up so that its bow, the front part of the liberty launch, was about even with the Jacob's ladder, is that correct?

(Deposition of Malcom Edward Potts.)

A. No, no. The front part was protruding forward.

Q. How much?

A. Oh, I would say about eight foot, until it got back close to where the cabin was.

Q. Where was the Jacob's ladder with relationship to the front of the cabin on the liberty launch that you referred to?

Mr. Kennedy: I object to that on the grounds that it is improper redirect examination. This matter was not covered in the cross examination.

Mr. Williams: Would you please answer the question?

Maybe you had better read it.

(Pending question read by the Notary.)

The Witness: I would say about three or four feet in front of the cabin.

Q. (By Mr. Williams): How much space was there on the liberty launch in front of the cabin?

Mr. Kennedy: Excuse me. I am sorry. "How much space was there in front" of what?

Q. (By Mr. Williams—Continuing): On the liberty launch, on the deck of the liberty launch?

A. Yes—

Mr. Williams: I will change the question to that extent. In front of the cabin of the liberty launch?

Mr. Kennedy: The same objection, as it is improper redirect, and to save me from jumping up and down here all the time, can it be understood I will have a continuing objection?

Mr. Williams: You better interpose each one.

(Deposition of Malcom Edward Potts.)

Mr. Kennedy: Very well.

Q. (By Mr. Williams): All right. Now, do you know the question?

The Witness: Yes.

Mr. Williams: Would you please answer?

The Witness: How much space was in front of the liberty launch?

Q. Forward from the cabin.

A. From the cabin. Oh, let me see. I would say about five or six feet, something like that, maybe more.

Q. That was the only place on the liberty launch from which you could board the——

Mr. Kennedy: Objected to as leading.

Mr. Williams: Wait until I finish my question.

Q. (Continuing): ——from which you could board the Jacob's ladder?

Mr. Kennedy: Objected to as leading. [61]

Mr. Williams: I will withdraw the question.

Q. State whether or not the deck of the liberty launch forward from its cabin was the only place from which you could board the Jacob's ladder at the time and place referred to.

Mr. Kennedy: Objected to as leading.

Q. (By Mr. Williams): Will you answer the question? A. Yes.

Q. That is the only place?

A. That is the only place. In other words, you mean you have to come up there to get on the Jacob's ladder, is that what you mean?

Q. That was the import of my question, yes.

(Deposition of Malcom Edward Potts.)

A. Yes, yes.

Q. Do you know if there were any men waiting there when you started up the Jacob's ladder?

A. No. I can't remember. I don't think so, but I don't remember for sure.

Q. You were the second man up the Jacob's ladder? A. Yes.

Q. Well, did the men just file out of the cabin and onto this deck preparatory to going up?

A. Yes.

Q. Were you on regular shore liberty at the time you went ashore? [62] A. Yes.

Q. You had received permission from your superior to do so? A. Yes.

Q. And at the time of your return, you were returning to the ship to spend the night there in your bunk? A. Yes.

Q. And you did not have to go to work again that next day? A. No, sir.

Q. Mr. Potts, I believe you stated on cross examination that at other times when you drank, that you had more to drink than you had on this particular occasion. A. Yes.

Q. That was your testimony, was it not?

A. Yes.

Q. Now, did you have reference to times after the accident and after this occasion, or did you mean times before?

A. I will say times before and times after.

Q. Both? A. Yes.

Q. I see. That you had more to drink than you



(Deposition of Malcom Edward Potts.)

had upon this occasion? A. Yes. [63]

Q. Did you have anything to drink on this ship, on the way across? A. No, sir.

Q. And you didn't have anything to drink for at least 27 or 28 days before you went to port?

A. More than that.

Q. More than that? A. Yes.

Q. How much more than that? How long had it been before this occasion that you had had a drink, would you say?

A. Oh, let me see. Say up in January.

Q. Early January or late January?

A. I will say late January.

Mr. Williams: No further questions.

#### Recross Examination

Q. (By Mr. Kennedy): Mr. Potts, I just have several questions here. A. Yes.

Q. About two. Now, you testified further with respect to the distance on the launch's forward part and various things like that. Is your memory very clear as far as these distances are concerned?

A. No. I am just estimating and guessing at the——

Q. A general estimate? A. Yes. [64]

Mr. Kennedy: I believe that is all.

Mr. Williams: Mr. Potts, you have the right to read this deposition and sign it after reading it, if you want to, or you can reserve that right.

Mr. Kennedy: Or waive that right.

Mr. Williams: Or you can waive that right. That

(Deposition of Malcom Edward Potts.)

is what I mean. You can either do that or not, after the reporter has transcribed it and typed it up. It is not necessary that you do so, but you can, if you wish. What do you want to do? Do you wish to waive the reading and signing of the deposition, or do you wish to see it and read it and sign it after he has prepared it?

Mr. Kennedy: Off the record.

Mr. Williams: Off the record.

(Discussion off the record.)

The Witness: If I want to, I can take it and read it and if I think everything is correct and right in it, then I sign it and then give it back, is that right?

Mr. Kennedy: Yes.

The Witness: It doesn't make too much difference.

Mr. Kennedy: As far as we are concerned, you can waive the right.

Mr. Williams: You can waive the right, but it is up to you.

The Witness: If I waive it, then it will just go on [65] to you?

Mr. Williams: Yes, that is correct.

The Witness: Then, there is no need that I should sign it. I waive that right.

The Notary: Do you also waive reading it?

The Witness: Yes. [66]

[Endorsed]: Filed March 25, 1955.

## LIBELANT'S EXHIBIT No. 3

/Rejected/

FILE: GW/PS/A25/0815

453

## REPORT OF PERSONAL ACCIDENT NOT INVOLVING DEATH

UNITED STATES COAST GUARD

MAYCG-924-E (REV. 11-65)

## INSTRUCTIONS

BUDGET BUREAU NO. 85-9010

APPROVAL EXPIRES JULY 31, 1968

This form is to be filled out whenever any person (passenger, member of crew, or other person, except longshoremen and harbor workers) is injured on board any vessel of the United States and the injuries incapacitate the injured person for a period in excess of seventy-two hours (3 days). No report of injuries to longshoremen or other harbor workers occurring on vessels need be made, as by other provisions of law such injuries are reported to the United States Employees Compensation Commission.

A signed original and two signed copies shall be addressed to the Officer in Charge, Marine Inspection, in whose district the accident occurred, or in whose district the vessel first arrived after such casualty. The report shall be submitted within ten (10) days after the accident or within ten (10) days after the vessel's first arrival at a United States port if the accident occurred at sea. The report may be submitted by mail, but in order to avoid delay in investigations, it is desired that reports be submitted in person. Submission of reports in person may be made to a Marine Inspector at any port convenient to the Master. The Officer in Charge, Marine Inspection, shall forward one copy to the Commandant, U. S. Coast Guard, and one copy to the District Coast Guard Officer.

NAME OF VESSEL: **SS AUGUSTIN DALY** PORT OF ORIGIN: **PORTLAND, ORE.** DATE SUBMITTED: **8-21-52**

## I. PARTICULARS OF VESSEL AND VOYAGE OR PLACE

1. NAME OF VESSEL <b>SS AUGUSTIN DALY</b>		2. HOME PORT, OR PORT WHERE NUMBERED, IF MOTORBOAT <b>San Francisco, Calif.</b>	
3. DISTRICTAL NUMBER <b>245 223</b>		4. NAME OF OWNER OR OPERATOR <b>U. S. Government (W.R. Chamberlin, Gen'l Agent)</b>	
5. WHEREIN THE ACCIDENT OCCURRED <input checked="" type="checkbox"/> IN PORT <input type="checkbox"/> AT SEA		6. IF ACCIDENT AT SEA, GIVE NAME OF PORT	
7. LAST PORT OF DEPARTURE <b>Sasebo, Japan</b>		8. DATE OF DEPARTURE <b>April 6th, 1952</b>	
9. DATE OF ACCIDENT <b>April 6th, 1952</b>		10. WHERE DOING <b>Sasebo, Japan</b>	
11. DATE OF REPORT <b>8-21-52</b>		12. PAGE COMPLETE <b>--</b>	

## II. PARTICULARS OF INJURED PERSON, INJURY, AND ACTION TAKEN

1. NAME OF INJURED PERSON <b>JOHN FARLEY</b>		9. HOME ADDRESS <b>Box #15, Reedville, Oregon</b>	
2. AGE <b>58</b>		10. DATE AND TIME OF INJURY (Specify time standard) <b>April 6th, 1952 - 0040 (Jap Std Time)</b>	
3. CAPACITY IN WHICH EMPLOYED ON VESSEL <b>2nd Asst. Engr.</b>		11. DATE AND TIME OF REPORT <b>8-21-52</b>	

Possible broken back, possible broken shoulder - no doctors report received

John Farley was waiting on liberty boat at 0040 April 6th 1952 to climb aboard the vessel with pilots ladder when M. Potts, Asst Cook, lost his grip and fell from the Pilot ladder, falling on John Farley knocking him down and unconscious. M. Potts was not injured.

13. WAS INJURY IN LINE OF DUTY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		14. DAYS INCAPACITATED DUE TO INJURY, DURING THE VOYAGE <b>Remainder of voyage, approx. 4 1/2 months</b>	
--	--	---	--

No - but due to probable fault of M. Potts somehow losing his grip on ladder.

15. NAME AND ADDRESS OF WITNESSES TO ACCIDENT (At least two, if possible) <b>H. Morgan, Oiler - 707 - 29th Ave. S</b>		16. ADDRESS OF WITNESSES <b>Seattle, Washington</b>	
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17. IF INJURED PERSON WAS HOSPITALIZED, CHECK ONE <input checked="" type="checkbox"/> FOREIGN HOSPITAL <input type="checkbox"/> DOMESTIC HOSPITAL		18. IF FOREIGN HOSPITAL, WAS REPORT MADE TO U.S. CONSUL <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
--	--	--	--

19. Give name and address of hospital <b>8021 Station Hospital (U.S. Army) Sasebo, Japan</b>		20. Give location of consul to whom report was made. <b>Pusan, Korea</b>	
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CERTIFIED TO BE A TRUE COPY OF A SIGNED COPY IN FILES OF MERCHANT MARINE INVESTIGATING SECTION, PORTLAND, OREGON.

/s/ W. J. ACCURSO

Signature of Master

J. W. CONWAY, LCDR, USCG;  
Senior Investigating Officer, Portland, Oregon.

(p)





LIBELANT'S EXHIBIT No. 4

March 25, 1954

W. R. Chamberlin & Co.  
601 Board of Trade Building  
Portland 4, Oregon

Re: John Farley  
Injury of April 5, 1952  
SS Augustin Daly

Gentlemen:

Claim is hereby formally made against the United States of America, as owner and operator of the SS Augustin Daly, through you, as general agent, by the undersigned, John Farley, former Second Assistant Engineer, employed on board said vessel, for damages and maintenance and cure arising out of injuries sustained by him in his service on said vessel on a voyage commencing on or about February 24, 1952, at Portland, Oregon.

The undersigned, Mr. Farley, received injuries on or about April 5, 1952, in the harbor of Sasebo, Japan, when another crew member fell from a pilot (or Jacob's) ladder affixed to said vessel, and landed on the head and shoulders of the undersigned, who was standing below in a lighter alongside the vessel, waiting to go aboard said vessel.

At the aforementioned time and place the undersigned sustained fractures of the clavicle and several vertebrae, and other general injuries to his shoulders and back, all of which has totally incapacitated him from the performance of any gainful occupation to this date. The undersigned has been

informed, and he believes, that the injuries to his back and shoulders are permanent.

The undersigned, John Farley, claims damages in the amount of \$110,000.00, by reason of the negligence of the ship owners, in failing to provide him a safe means of ingress and egress to said vessel; in failing to provide him with a safe place in which to work, and in maintaining an unseaworthy vessel.

The undersigned also makes claim for maintenance and cure in the amount of \$8.00 per day for an indefinite period of time from and after July 23, 1953.

The claimant was born at Newark, N. J., January 28, 1894, and his present home address is P. O. Box 15, Aloha, Oregon. His certificate of identification number is BK. No. 107585.

Very truly yours,

cc: U. S. Maritime Administration  
West Coast Transoceanic SS Line  
Krause, Evans and Lindsay

LIBELANT'S EXHIBIT No. 7

W. R. Chamberlin & Company

Wages paid to John Farley for services performed  
S.S. Augustin Daly February 2, 1950 to August 13, 1952:

	Wages Including Overtime	Wages Plus F.O.A.B.
Feb. 2nd to 8th.....	\$ 80.49	\$ 121.49
Feb. 9th to 24th....	438.27	466.17
Feb. 25th to Apr. 6th	842.79	913.74
	<hr/>	<hr/>
Sub Totals ....	\$1,361.55	\$1,501.40

Unearned Wages:

April 7th to July

31st ..... 1,670.91

Aug. 1st to Aug. 13th 188.80

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Total Wages ...\$3,221.26

Total Wages and F.O.A.B.....\$3,361.11

\* \* \* \* \*

## LIBELANT'S EXHIBIT No. 8

[Rejected]

April 3, 1954

Krause, Evans & Lindsay,  
Attorneys at Law,  
Portland Trust Building,  
Portland 4, Oregon.  
Attention Mr. Dennis Lindsay.

Re: Farley vs. U. S. A.  
U. S. District Court,  
Civil No. 7435.

Dear Mr. Lindsay:

Enclosed herewith is a copy of the libel filed yesterday in the above-captioned cause, wherein you have advised that you will represent the respondent, United States of America.

You may be assured that plaintiff will not insist upon the filing of any answer or other appearance on behalf of the respondent until after May 25, 1954.

Yours very truly,

Williams & Alley

.....

David R. Williams

DRW:EH  
Enclosure



LIBELANT'S EXHIBIT No. 13

DEPOSITION OF RAY H. ROBINSON

\* \* \* \* \*

RAY H. ROBINSON

was thereupon produced as a witness in behalf of libelant, and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Williams): Would you state your full name please? A. Ray H. Robinson.

Q. What is your present address, Mr. Robinson?

A. Post Office Box 104, Brightwood, Oregon.

Q. That is your home address?

A. Home address.

Q. What is your business address?

A. Business address, 216 Governor Building, Portland, Oregon.

Q. What is your occupation, Mr. Robinson?

A. I am a Marine Engineer, my trade is Marine Engineering, and present since January 1, 1941 I have been Financial Secretary, Treasurer and Business Manager for Marine Engineers Beneficial Association No. 41, Portland, Oregon.

Q. And, you are so employed right now?

A. I am.

Q. Do you know where you are going to be tomorrow, which is July 27th, and Thursday, July 28th? Are you going to be in Portland?

A. I will be enroute or in San Francisco, California. [3]

(Deposition of Ray H. Robinson.)

Q. And, you do not expect to be back until what time?      A. The first of next week.

Q. Mr. Robinson, prior to having your present employment, you were a Marine Engineer aboard various ocean going vessels?

A. Yes. I started to sea in 1923, worked as a fireman, oiler—got my license in August, 1934; have been an engineer on the various vessels until taking the position that I have now, in 1941.

Q. And, the men that you represent, are they substantially the only Marine Engineers in this area; are substantially all of the engineers in this area members of your Local?

A. All in the Pacific Coast area, that is deep sea engineers except for a very few belong to, I believe the Affiliated of the S.I.U. There is a couple of lumber carriers here.

Q. Are those latter category of men small in number?      A. Very small.

Q. Approximately how many men in your Local?      A. This Local in Portland?

Q. Yes.      A. 282.

Q. Are they all licensed engineers?

A. All licensed engineers.

Q. Now, I am going to hand you some of these—an agreement between the National Marine Engineers' Beneficial Association, [4] Pacific Coast District and the Pacific Maritime Association covering offshore, intercoastal and Alaska trades, dated November 17, 1946.

Does this particular booklet that you have in

(Deposition of Ray H. Robinson.)

your hand represent the agreement between your Union and the Pacific Maritime Association with regard to wage rates for Marine Engineers during the periods covered therein?

A. It does as of these dates.

Q. What is the pay scale for a Second Assistant Engineer sailing on a Liberty class vessel as of the earliest date mentioned therein? A. \$379.68.

Q. And, is that particular booklet amended by a pamphlet part effective as of a later date?

A. It is.

Q. Is there a change by virtue of the amendment in the wage rate, monthly wages for a Second Assistant Engineer, sailing on a Liberty vessel?

A. It has been raised to \$411.88.

Q. As of what date?

A. As of effective September 30, 1950.

Q. I am going to hand you the next booklet, Mr. Robinson, which appears to be an agreement between the same parties, effective date is stated on the cover to be June 16, 1951, to and including June 15th, 1953. [5]

I will ask you what wage, monthly wage scale is provided therein for a Second Assistant Engineer sailing aboard a Liberty class ship?

A. Effective July 14th, '51, \$426.21.

Mr. Krause: What was that again?

The Witness: \$426.21. Then effective one month later or July 15th, 1951, it was raised to \$435.89.

Mr. Krause: What was that date when that became effective, July what?

(Deposition of Ray H. Robinson.)

The Witness: July 15th.

Mr. Krause: 1951?

The Witness: Yes.

Mr. Krause: What was the previous one for then?

The Witness: July 14, '51.

Mr. Krause: That is just one day apart?

The Witness: Yes.

Mr. Krause: For a period prior to July 14, 1951?

The Witness: June 16th to July 14th.

Mr. Krause: Oh, June 16th to July 14th.

However, I have no objection to those contracts and anything being read, the rates out of those, so you don't have to put this up unless you have some question——

Mr. Williams: I just want to show what they are.

Mr. Krause: If you prove the contract the Judge can read it or you can just as well—— [6]

Mr. Williams: I realize that, but you have dates involved in this matter and there are some things here that perhaps we will require some explanation about.

Q. (By Mr. Williams): The next agreement I am handing you states that it is effective June 16th, 1953, to and including June 15th, 1954. Is that the next applicable agreement as to wages between these parties that we have mentioned?

A. That is.

Q. And, what is the wage scale therein provided



(Deposition of Ray H. Robinson.)

for a Second Assistant Engineer sailing on a Liberty class vessel?

A. \$521.33. That was effective June 16, 1953.

Q. I am going to hand you another agreement which appears to be effective June 16th, 1954. Is that the current agreement between the parties?

A. That is the current agreement and there was no change in wages.

Q. The wage scale is the same as the previous one?

A. That's right.

Q. Which would be the \$533——

A. This was effective June 15th, '54.

Q. And, the rate therein provided——

A. \$531.23.

Q. Now, Mr. Robinson, in addition to these basic wages does the Marine Engineer, are there provisions in the agreement whereby the Marine Engineers are entitled to overtime [7] under certain circumstances?

A. Yes, there is a penalty rate of overtime for Marine Engineer. He is entitled to during his regular working hours while on watch at sea, we will say on Saturdays, Sundays and holidays of \$2.29 additional.

Q. That is the current?

A. The current. Now, that is during his regular eight hour work. Then, for all work performed over eight hours a day he receives overtime rate of \$3.29 per hour. That would be for time in excess of eight hours or for work in port on Saturdays, Sundays and holidays.

(Deposition of Ray H. Robinson.)

Q. Mr. Robinson, approximately what percentage, if you know, of your employees are presently employed?      A. In this Local?

Q. Yes.      A. In this Local itself?

Q. Yes.

A. At the present time I have 24 employees out of work. I just checked the books a few minutes ago.

Q. 24 out of two hundred and——

A. I wouldn't put the 200, the total membership—I would say 240 men there are who wish to work who are constantly working.

Q. You have some men who do not appear ready and willing to take jobs? [8]

A. That's right.

Q. That would represent about ninety per cent?

A. Around ninety per cent at the present time are working who wish to work.

Q. Do you know what the average monthly pay would be for a Marine Second Assistant, Marine Engineer, sailing on a Liberty class vessel that was making a foreign voyage, not an intercoastal.

Mr. Krause: I would like to object to that. There is no average. Every steamship company manages its operation differently and some vessels have much more overtime than others.

Mr. Williams: You have no objection to the form of the question?

Mr. Krause: No, go ahead.

Q. (By Mr. Williams): Would you answer that, Mr. Robinson?

(Deposition of Ray H. Robinson.)

A. What Mr. Krause has said is very true. I would hesitate to state a true average whereas the men come in many of them quoted what they have made, why it will be safe to say that from \$700 to \$800 is a fair figure. Many of them have told me they made \$800.00, and I might say it might have been excessive overtime, but with the penalty time, the night watches in foreign ports, they are entitled to, on top of their monthly wages, a \$700 figure is pretty safe if you took all companies involved, I believe you would see it a \$700 average [10] would be pretty close.

Q. Mr. Robinson, are there any compulsory retirement dates for Marine Engineers? A. No.

Q. There are none provided either by your own Union or the Coast Guard?

A. No. If a man is physically fit he may work as an Engineer, Marine Engineer, as long as the employer will have him.

Q. Yes. Is there any provision at the present time for pensions for retired Marine Engineers, either Union sponsored or company sponsored or both?

A. At this date there is no pensions, that is by the Marine Engineers Union. There are a few companies who do have their own pensions if the men have worked in that company 20 or 25 years length of services plus age, a certain amount of money is paid per month in the retirement fund by the employee and the rest of it is by the em-

(Deposition of Ray H. Robinson.)

ployer, but there is only a few companies that do that.

Q. Have such plans been in effect for a long time or just recently?

A. I would say for quite awhile. Matson Steamship Company has had it for a long time, but I don't recall any other company on this coast that has such a plan.

Q. If a Marine Engineer, a member of your [10] Local is of the age of seventy years and in otherwise good health, is he able to be employed aboard ocean going vessels?

A. Well, that is a question I believe I answered before. If the company will accept him, age is no barrier.

Q. Yes.

A. You see, Engineers must go through a physical. The companies have insurance doctors, their own doctors, and they have the public health doctor, so he must be physically fit before they will pass him.

Q. But, otherwise there is no inhibition just because of age?

A. No, very little. With the sea going game they are very fair pertaining to age.

Q. Does the work of a Second Assistant Marine Engineer, does his employment occasionally require heavy lifting or hard work?

A. Oh, I would state that at times there is hard work, bound to be, and it is all according to what you would call as heavy lifting.



(Deposition of Ray H. Robinson.)

It is true on a vessel he may call for help to help him, but he is expected to work, to put out work and it is hard work, I will classify it that way, at times.

Q. You mean to indicate, do you, that he does not do hard work, hard manual labor all of the time? A. That is true. [11]

Q. But, on occasions?

A. On occasions, just occasionally.

Q. That he is required to do so? A. Yes.

Q. Mr. Robinson, from your previous experience at sea, I wonder if you are familiar with any practices aboard ship with regard to orders to be given between different departments of the ship itself by various officers of the ship?

A. I don't think the orders have been changed or the ones in charge there have been changed for many years.

Q. Then, as far as you know they are the same today as they were when you were shipping?

A. That is true.

Q. Do you know in general what orders and responsibilities—I should say responsibilities and duties a Second Assistant Marine Engineer has with regard to other men on the ship, that is to say, do you know who he is required to take orders from and to give orders to?

A. He takes orders we will say from the Chief Engineer or the Captain of the vessel at all times and occasionally the First Assistant Engineer will give him an order, usually convey an order from the Chief Engineer.

(Deposition of Ray H. Robinson.)

Those are the only men that give the Second Assistant his orders. [12]

Q. Now, what men are under the Second Assistant, to whom does he direct orders if to anyone?

A. Well, the men on his watch, whom he may have on his watch or the men who may be working with him in port on repair work, an additional fireman, oiler or wiper, but that is the only ones that he gives orders to. Some of the unlicensed crewmen who are either on watch with him or working with him in port.

Q. They are unlicensed crewmen in his department? A. That's right.

Q. That is in the Engine Department?

A. That's right.

Q. That would be wipers and oilers and firemen? A. That's right.

Q. Does a Second Assistant Marine Engineer have the right to give orders not pertaining to his Department, that is not pertaining to engine room work to other unlicensed personnel aboard the ship?

A. No. No, with the exception that he may just to the mess boy, he orders his meals and may ask for certain changes in his room or something of that sort, but he doesn't give any direct orders to any other department, within any other department.

Q. Does he as a matter of general practice give orders with regard to ingress and egress from the ship by other [13] members, unlicensed members of the crew that are going on shore liberty?

(Deposition of Ray H. Robinson.)

A. Not to my knowledge I have never heard of him giving any orders.

Now, what do you mean, if he were for some unknown reason, if he were put in charge of a boat, a liberty boat taking crew members ashore then he would be able to give orders while he was in charge of that boat, but that doesn't happen too often. I don't know just what you are getting at now.

Q. Do you have reference there to a liberty boat, to a ship owned liberty boat?

A. One of the life boats or work boats.

Q. You don't have reference to a liberty launch that is chartered from a private company or a person in a foreign port?      A. No.

Q. You don't mean that?

A. No. Liberty boat, he would just be a passenger aboard that boat, he would have no right to give any orders because he is off duty anyway.

Q. Is it your testimony then that crew members going ashore in a liberty launch which is not owned or operated by the ship itself, that no one is in charge of the vessel going to the dock or coming back? [14]

A. If it is privately owned and the company or the Government is furnishing the boat there is no crew member would be in charge of it or have anything to do with it as far as orders is concerned.

Mr. Williams: I have no further questions.

Mr. Krause may wish to ask you some questions.

(Deposition of Ray H. Robinson.)

Cross Examination

Q. (By Mr. Krause): Mr. Robinson, what sort of a license do you hold now?

A. First Assistant Steam, any horse power.

Q. And, that is it as far as you have gone with Engineer's license, is it? A. That's right.

Q. Now, you have sailed in what capacity?

A. Sailed Third, Second, First Assistant.

Q. You have sailed Trans Pacific, have you?

A. Trans Pacific.

Q. You are familiar with the anchoring of vessels in Japanese harbors while they are discharging and loading cargoes?

A. I have been anchored in those harbors many, many times on vessels from 1923 until 1941.

Q. When they were discharging and loading out while they were at anchor or at a buoy?

A. Yes. [15]

Q. Then you have gone ashore in vessels provided by the ship when you were on liberty yourself? A. That's right.

Q. These in your time did the ship provide the liberty launch or were they launches that just came out there and the crew paid for their transportation?

A. Once in a great while the company would have a launch but very seldom.

Q. Now, Mr. Robinson, you many times signed Articles, haven't you, on American vessels?

A. Yes, sir.



(Deposition of Ray H. Robinson.)

Q. And, the Engineers along with all of the other crew sign the same Article, do they not?

A. They do.

Q. Among other things, those Articles provide that no grog or liquor is to be brought aboard the ship, do you recall that?

A. Uh-huh.

Q. Does an Engineer, say a Second Assistant Engineer have any duties or obligations with respect to enforcing that part of the Article?

A. I to my knowledge he does not except his own self bringing it aboard. When he signs those Articles he agrees that he will not bring the grog aboard but I don't believe that he is supposed to watch every other crew member. [16]

I know I was never asked to in all of the years I went to sea.

Q. Now, did you ever participate in searching the crews quarters in order to dispose of liquor that they had brought aboard?

A. My time I never was on a search party, no.

Q. You know of it having been done?

A. I know it has been done.

Q. Who does it, who makes the search?

A. Well, the heads of the department made the search while I was aboard.

Q. Only the Chief Engineer?

A. No, the Captain at these few times, the Captain, Chief Engineer, Chief Steward and sometimes the Chief Mate and First Assistant.

Q. First Assistant Engineer?

A. Sometimes they would go along as a witness

(Deposition of Ray H. Robinson.)

to the effect. He would go as a witness with the Chief.

Q. When searching engine room quarters you say that the Mates did that job or did the Engineer Officer do it?

A. The Engineer Officers did but usually the Mate or the Skipper would be with the Chief Engineer.

Q. Yes.

A. Very seldom go alone. They have some other department with them. [17]

Q. Now, you know Mr. Robinson, don't you, that the ship owner has certain obligations towards his crew, doesn't he? A. Uh-huh.

Q. Who assumes those obligations for the ship owner when the ship is at sea and away from port?

A. The Captain would be.

Q. The only one?

A. He would be the representative of the company. It is sometimes considered that the Chief Engineer is a representative also but it is generally quoted and believed that the Captain is the representative of the company.

Q. Well, for certain purposes, but we are not talking about the operation of the vessel—do all of the officers have any obligation to do everything that they can to preserve the ship or crew and cargo from injury or loss?

A. The Engineers have the obligation to keep the vessel in very good running condition, I will

(Deposition of Ray H. Robinson.)

say that, but they are not considered to be nursemaids for the rest of the crew.

Q. They have no obligation towards the other members of the crew than to see that they are protected against injury?

A. Yes, yes as far as injury. You have everything in safe working order. If an Engineer would see anything that wasn't in safe working order he certainly should report it and attempt to have it fixed.

Q. Pardon me, go ahead. [18]

A. But, as far as I might say, being a guardian or a nursemaid to the rest of the crew, no, you don't have anything to do with that. You would be in trouble at all times if you would tell a sailor or a mess boy or a fireman or anyone else he can't go ashore and take a drink. He would say, mind your own business, which I have seen that happen various times; my own crew members come back with a few drinks or so and they would raise the devil because they weren't producing, you would get none of your damn business what I do when I am not aboard this vessel is what you would get.

Q. Is it any of the officers business when they do get on the ship?

A. Yes, yes, I will say that when they are drinking aboard the ship why it is the business of the officers, the heads of the departments.

Q. Just the Chief Engineer then for the engine room crew and the other officers have nothing to do with it?

(Deposition of Ray H. Robinson.)

A. The other officers are to report to the Chief Engineer.

Q. Well, when you see a man drinking as Second Assistant Engineer, a member of the engine room drinking on board the ship, we will say he is right on watch at the time, is it one of your duties to tell him to stop?

A. It is if he is on watch.

Q. And, if he is not on watch and drinking in his quarters, is it your duty to tell him to quit drinking on the ship? [19]

A. First place I don't see what business an Engineer has of rooting around the crews quarters. That is his home and I for one wouldn't be around the crews quarters unless I was called to go back there, trouble of some sort.

Q. You can assume you are back there anyway. Now, when you see him drinking on the ship, knowing of the rule that there is to be none on the ship and that he is not to have any intoxicating liquor with him, now what do you say, the Second Assistant Engineer, does he have any duty in that regard?

A. I will say that he personally had no right to tell that man, you quit your drinking. I would say he should report it to the Skipper and the Chief, that is it, he had no business—he should report it to his superiors.

Q. Now, does the Second Assistant have any obligation at all towards warning a member of the crew not in his department, if he sees him doing



(Deposition of Ray H. Robinson.)

something that he considered hazardous or dangerous?

A. If he is jeopardizing anyone's life I would say that he would have a right to at the time to attempt to stop him and then report it to his superior.

Q. Well now, assume that the Second Assistant is standing at the foot of a Jacob's ladder or pilot ladder and a member of the Steward's Department is climbing this ladder roughly 18-20 feet high with a bottle of whiskey under one arm and another bottle of whiskey in his right hand, would the Second [20] Assistant Engineer have a duty to warn him?

A. The Second Assistant wouldn't have a thing to do with that man as long as he was in this liberty boat.

Q. He is going up the pilot ladder.

A. He is not aboard the vessel. There is someone there to stop him if he is doing something wrong, but until he gets aboard the vessel, the Second would have nothing to do with him, nothing to say to him.

Q. He would have no duty to warn him against the chance of getting hurt?

A. If I were aboard there, Mr. Krause, I could probably answer it a little more, if I were there and seen what it was. If a man was stupefied drunk I myself would attempt to help him, but I don't know what condition this man was in actually, but

(Deposition of Ray H. Robinson.)

I do say that the Second would have no business to give this man any type of orders at that moment.

Q. You consider that an order when he just warns the man that that is a dangerous thing to do?

A. If the man is a seaman he sure as the devil would know it was dangerous.

Q. We are talking about a man, a member of the Steward's Department at the moment.

A. It is all according how long had he gone to sea.

Q. Well, usually, Mr. Robinson, all you know about the members of the Steward's Department is that they have been [21] on the ship since the beginning of that voyage.

A. That's right.

Q. Now rarely do you know how much sea experience they have had, but assuming that you know nothing about that and a member of the Steward's Department is climbing a Jacob's ladder, both arms are or hands encumbered as I have described, does that call for a warning on the part of an officer of the ship?

A. At the time I will say that the Second had no business to give any kind of an order. It was up to him if he wanted to be a good fellow, if you saw the guy was not doing the proper thing, attempt to help him, but on the other hand that messman as you say, whoever he may be, might of just told him where to go. If he butted in he may have had an argument with him on the way out to the boat. Not knowing the nature of who that man was climbing the ladder, I couldn't answer.

(Deposition of Ray H. Robinson.)

Q. Your view is that he had no obligation to try to protect members of the crew against injuring themselves under those circumstances?

A. I don't think he had any obligations when he was sitting in the boat as far as butting into what this man done.

Now, if the man was stupid drunk, I would say that he has a moral obligation as a human to try to help him. That is the only obligation he had. I don't think he had an obligation to anyone but just to that man.

Q. Well, the fact that he is an officer of the ship you feel [22] doesn't put any duty on him to, in all situations, to try to protect the man against injury?

A. Well, we will put it this way; maybe he is supposed to protect himself too. This guy is liable to turn around and open his head up with something. I have seen that.

Q. Let me ask you this, Mr. Robinson, in going up a pilot's ladder with a bottle of whiskey under one arm and holding another bottle by the neck with the other hand, is that a safe or a dangerous method of climbing?

A. It is a dangerous way of climbing, a damn dangerous way.

Q. Now then, what about a man standing under the ladder while the man is going up in that position, is that a safe place for him to be?

Mr. Williams: Counsel, I feel that I should object unless you specify as to whether the individual you are referring to knows of the man in this condi-

(Deposition of Ray H. Robinson.)

tion, if he knows that the man is doing what you say he is doing.

The Witness: Normally someone is at the bottom of that ladder attempting to hold it.

Q. (By Mr. Krause): To hold it?

A. To hold that ladder or hang on to it because it will swing back and forth if it is a regular Jacob's ladder.

Q. Leaning against the side of the ship?

A. Sure, trying to hang on to it. He is on a boat, you have to hold the boat up next to the ship too, don't you? [23] You are bound to be under it.

Q. According to the testimony we had, it was tied, made fast to the ship some way or the other. That is all there is on it so far, so at any rate the men I am talking about were not trying to hold the boat in.

I am just asking you now as a general proposition if you see a man going up the ladder as I have described him, is it a safe place for you to stand at the foot of the ladder?

A. It isn't safe to stand at the foot of the ladder if the man had both hands on it as far as that goes. To stand under anyone wouldn't be safe unless you were forced to stand there. I would say that because a man's hands could slip, hell, on any ladder.

Q. Even a man that has both hands for the ladder there are times when they fall off of them perfectly sober?

A. No, I have never seen them fall, but I will say for my own protection as far as safety, many



(Deposition of Ray H. Robinson.)

occasions you will have them, two men going up the ladder at once.

Q. Well, is that what you advocated to members of the crew that you gave orders to, that they should do that?

A. I never gave any orders about climbing a ladder because I was in the engine room.

Q. Don't you have any straight up and down ladders in the engine room, Mr. Robinson?

A. Oh yes, more of them a few years back than you have now. [24]

Q. Now, did you tell your men to climb the ladder one immediately below another one?

A. Never gave such orders, no.

Q. Did you warn them against doing that sort of thing?

A. No, I can't say that I did because I just didn't have the occasion to do that.

Q. But, you said you saw some men doing that?

A. Oh, I have seen them at times.

Q. And it was under circumstances when you weren't under any obligations to instruct them or warn them? A. No.

Q. Now, is a ship a place where people get hurt frequently? A. Aboard the vessel?

Q. Aboard the vessel.

A. Oh, according to what you would say frequent. Some vessels you know you would have more accidents than others. The warning aboard the ship is safety first and they are fairly, pretty well corrected aboard the vessel as far as hazardous.

(Deposition of Ray H. Robinson.)

There are ladders that wouldn't be stationary and there are chains across where there is open spaces or they are covered up pretty well. It is negligence in the engine room if someone gets hurt when it is going in motion. At times there can be accidents, yes, falling on the floor and that, and you are hurt by working mechanical work, you are bound to get smashed up, but I don't think there is any [25] more accidents aboard a vessel than there is in any other type of work, myself.

Q. You don't think it is a hazardous occupation?

A. It is. It is considered hazardous, but it is no more hazardous than the hazardous occupations, the ones considered hazardous ashore. We have mechanical machine shops, power plants and various things of that sort that would be comparable.

Q. There are many, many that are comparable?

A. Yes.

Q. Are there places aboard ship where you could take bad falls unless you are watching what you are doing?

A. Any man could take a bad fall if he started down the engineer room ladder and didn't look what he was doing. Various places out on deck, going from one deck to another, stepping over a threshold, trip, there is places that you could if you weren't alert.

Q. As to pads and eye bolts and things that are fastened to the deck that you stumble over, you aren't watching?

A. That's right.

Q. Well, generally, Mr. Robinson, is a ship a

(Deposition of Ray H. Robinson.)

place where a man is expected to keep his eyes open at all times in order to avoid injury?

A. That's right, you normally have to.

Q. You normally have to. [26]

A. You have bad weather when the ship is turning and tossing it makes it a little more hazardous.

Q. Aboard ship you have to be observant of the loading conditions and cargo that is being swung overhead and so on?

A. Yes, they do. There is usually, normally, a hatch tender or a watchman there so if someone wouldn't be familiar with the operations of the vessel, they could stop them, but you are expected to keep your eyes open so you don't get hit with a sling load of lumber or cargo or open hatches, walk into them.

Q. Now, what do you say regarding the obligation of any crew member when another one precedes him up the ladder? Is it his duty to watch the man that is going up the ladder in order to protect himself, I mean?

A. Well, self preservation, if we put it that way, a man would be, should be watching any danger that might befall him, but if he thinks it is dangerous, if he doesn't he wouldn't be looking. That is a heck of a lot, a lot of people don't look when there is danger there, where if they had of been looking they wouldn't of got hurt.

Q. Now, you haven't been to sea since '34?

A. No, since 1941, January 6, 1941.

Q. Since 1941. Was it not uncommon for mem-

(Deposition of Ray H. Robinson.)

bers of the crew that had been on liberty going ashore to come back somewhat inebriated when you were sailing? [27]

A. That has been I guess the practice since there were seamen, that they went ashore and had a few drinks, that is a certain percentage. We don't say that all drink, of course, but they would go ashore for a few drinks and would be partly intoxicated when they came back.

Q. Well, it was not uncommon?

A. It wasn't uncommon, no, it wasn't.

Q. Now then, would a person coming from shore with seaman that had been on liberty, a man that is familiar with the sea and the operation of ships, would he normally expect that some of the men might be somewhat under the influence of liquor?

A. Well, I will say this, that a man who has gone to sea for many years has seen many of them under the influence of liquor. I will put it that way, and maybe on the other hand that a man going to sea a good many years and seeing that and there had been no accidents or anything, may tend rather to not pay any attention to any other man in that condition.

Q. He might not pay attention to the necessary things for his own protection?

A. Well, it may just become natural seeing that, we will say over a period of so many years, this same condition as you are speaking of.

Q. Well, it is common knowledge that people become careless in the face of dangers? [28]



(Deposition of Ray H. Robinson.)

A. That is true.

Q. If they are exposed to it a great deal?

A. Yes.

Q. Now, what I am particularly interested in hearing, what you have to say on whether or not you are coming back, a man, an experienced seaman and a licensed officer coming back from leave with a bunch of sailors and a number of messmen, colored messmen, cooks, and the method of getting aboard the ship is by a pilot or Jacob's ladder, is it your view that a man ought to, knowing of the drinking of the men under those circumstances, that he ought to see what condition those men are in, particularly if one of them proceeds him up a pilot's ladder?

A. Well, I will put it this way, I still say that he had no business butting into what they had did or what they were going to do, number one. Secondly, he should protect himself at all times. Now, if it is for his own good, he would protect himself, but he would have no right to give those men any orders, and he may not be fraternizing with the Steward's Department, it is another department, and very likely he wasn't in the same grog mill as these negroes you speak of.

They fraternize aboard the ship in saying good morning and so forth, but we don't mix with the other departments to any extent, and we certainly can't and don't give any orders. [29]

We have had a heck of a lot of trouble during the war and from the other unions, the race discrimination comes into it, where if you give an order

(Deposition of Ray H. Robinson.)

it is brought up in arguments, and it is kind of hard to know just what the situation was on that Liberty launch.

Q. I wasn't concerned about his giving anybody any orders. What I was concerned, what was he required to do in his own self protection when he was coming back in one of these liberty launches with a method of getting aboard the ship by a pilot's ladder and knowing that these men probably had been drinking while they were ashore.

Now, let me put it this way: Would a man, an experienced seaman have that in mind or should he have it in mind?

A. I say that he should protect himself at all times is true. Undoubtedly he was not, didn't see or wasn't paying any attention to who was going up the ladder, whether it was a man who wasn't capable of climbing with you say, just one hand is all he had, or who it was going up. Undoubtedly, he wasn't watching the man, there just isn't any getting around that.

Q. If he had been watching him, you don't think he would have stood where he could have fallen on him?

A. I doubt if he would be under him unless the occasion might have been that as I say, if it were a pilot's ladder or a Jacob's ladder. The ladder itself will swing a little bit [30] and usually you will attempt to steady that ladder if it is swinging around—I have done it to hold the ladder to help. When you come alongside with a boat, it is bound

(Deposition of Ray H. Robinson.)

to have a tendency to swing and at that time, of course, I would be looking right at the man who was going up.

Q. You would be watching him. Well, that is, you would keep your eyes on the man above if you had a job down at the foot of the ladder?

A. Uh-huh.

Q. Now, when you are talking about a pilot's ladder swinging, how does it swing?

A. Well, it is hooked, usually hooked up on, either on to the side of the ship where there is a plate extends up and then if it isn't tied at the bottom, which many times it wouldn't be, if there is a boat there floating, it is free, the ladder itself is free there at the bottom so it would have a tendency; to swing alongside of the boat.

Q. Now, if it is made fast to the rail of the boat deck then it is going to be, the ladder is going to be lying against the plate of the ship, isn't it?

A. Uh-huh.

Q. And, with a man on it above the point that he is standing on, there is no swinging of that ladder, is there?

A. No, because the weight would tend to hold it. It is the bottom—— [31]

Q. What difference does it make if the bottom swings if it doesn't swing at the point where this man is standing?

A. If it were held real steady it would be easier for you to step on up, it would be easier for the man going up, a little easier. Of course, I don't

(Deposition of Ray H. Robinson.)

say they were holding it or what the heck they were doing to the bottom of it.

The size of the boat, the condition of the water, there are so darn many things. If a man was there to see it, you could give better testimony.

Q. It would affect the thing?

A. It would affect the whole thing.

Q. Now, Mr. Robinson, I want to revert for a moment to the duties of the officers.

Do the officers, the Engineer Officers participate in fire and boat drill? A. They do.

Q. Do they give orders to the men in connection with fire and boat drill?

A. The Engineers occasionally, they tell them, occasionally there is an Engineer in charge of a certain life boat. He would give orders, but on a Liberty vessel I don't believe that the Second Assistant or even the First Assistant is in charge of a boat, so he wouldn't give the orders.

Q. The men assigned to the various lifeboats or to a lifeboat that an Engineer Officer is in charge of are not only [32] Engine Room men, are they?

A. That is true.

Q. That is, it will include Steward's Department and seamen too, probably? A. Uh-huh.

Q. Assuming that a man is doing something that would be hazarding the safety of the ship, would the Second Assistant Engineer have any duty to warn him about that?

A. Aboard the vessel itself?

Q. Well, aboard the vessel, say aboard the vessel.



(Deposition of Ray H. Robinson.)

A. He would, yes, any officer would if he would see anyone doing anything hazardous endangering the lives of anyone else he would be expected to warn him and then go, as I say, to his superior and tell it.

Q. Yes.

A. And, it is up then to the superior and the Skipper to get together and to alter or to stop this whatever it may be.

Various times, Mr. Krause, we will say about the drinking aboard the ship, if he happened to see it in a room he would be classed as a stool pigeon, and you know they could be down on him complete. So, they are pretty careful what they say right to the men they are working with.

They don't like to be classed as a stool pigeon and raising the devil, but I would say they should report it to their superior. [33]

Q. Well, the question is what the officers duties are, Mr. Robinson, not what they like to do.

A. Yes.

Q. Obviously you don't ever like to report anybody and probably everyone doesn't like to report anybody for any dereliction of duty, but the question is, what are the officers duties?

Now, that is what I am interested in. Now, you do say though that if you see a man that is doing something that is endangering either the ship or members of the crew, it would be your duty to warn him, the Second Assistant's duty to warn him?

A. Yes, it is, according to what he is doing, Mr.

(Deposition of Ray H. Robinson.)

Krause. If he was taking a drink I wouldn't say that he tell him that he shouldn't take a drink.

Q. Forget about the drinking. We are now saying he is doing something hazardous that is endangering the ship or a member of the crew, and we will say he is perfectly sober. A. Uh-huh.

Q. It would be the Second Assistant's duty to warn him and then report it?

A. If he were aboard the vessel, yes.

Q. Aboard the vessel.

Now then, if the man is doing that and he is just endangering the Second Assistant with this careless thing that he is doing, then it wouldn't be the Second Assistant's duty to warn [34] him?

A. Not if he weren't on the ship. The whole thing I say, a man, self preservation is what it is. A man should attempt to take care of himself. But, he couldn't give orders to the man when he is off of the ship in any respect.

Q. Well now let me—will you assume for this purpose that the ladder is for all ordinary purposes, and the Maritime Law a part of the ship?

A. Uh-huh.

Q. And when the man was on the ladder he was on the ship.

A. And the Second was on the boat, he was on the shore.

Q. In the launch down below it at the time, yes. But, it was still his ship, the Augustin Daly was still his ship, he was the Second Assistant on her—now you say that when he sees this man going up

(Deposition of Ray H. Robinson.)

there in what is a negligent fashion, assuming that he saw it and he saw the man endangered, what do you say as to his duty to watch this man, this third cook?

A. I would say if the man had anything but liquor or contraband aboard him, the Second Assistant would or should rather, help him get it aboard, but when it is against the law to take liquor aboard the vessel he sure as the devil wouldn't want to be touching that liquor himself, so I don't know what he would be able to say to this fellow because he doesn't rate a darn bit more than that man until they both get aboard [35] that vessel, as far as I can see, and he is not going to help him take that liquor aboard that ship, and he has no right to take it away from him aboard that launch and get his head busted in.

He has to protect himself to that extent.

Q. Now, these packages that this fellow had been carrying were not liquor then you feel the officer would have a different obligation?

A. I would say he may have—maybe they were on the outs, maybe he would say, I won't help him do anything. They might not have been friends too.

Q. Now, I am talking now about the safety of the Second Assistant Engineer. I am assuming that he didn't care what happened to this colored man, that man that was climbing up there, what about his own safety, was it his duty in order to protect

(Deposition of Ray H. Robinson.)

himself to warn that man against climbing the ladder in that way?

A. Well, I don't think that he was to warn the man at all, personally. I can't see where the duty enters into that at all. We are making a big thing out of a Second Assistant being an officer.

He is an officer, yes, considered by the law, but he is not around giving crew members and them orders. You see, he is just a Second Assistant. They call him a grease monkey actually and his authority doesn't amount to anything except [36] to the man right on his watch, that is all.

Q. All right then, can we put your testimony down here that he has no duty to warn this man against a hazardous thing that he is doing?

A. No, I didn't say that, I didn't say he did or didn't. Don't get me botched into what he has or has not got. No, I am just—I wasn't there. If I had been there, conditions are different. But, I will say one thing, the first place they were both on a work launch, there was no rating there at all. There is no duties as far as duties are concerned. How about all of the other men that were on there. We assume they all should have told this mess boy what he should do and shouldn't do. The Second didn't rate not one tiny bit more than that mess boy at that time on that launch there. They were just both American citizens and that is it. That is all there was to it. He wasn't connected with the vessel, he was on shore duty, he was free. He wasn't working, so I don't see where this comes into it at all,



(Deposition of Ray H. Robinson.)

what he was supposed to tell him and not supposed to tell him.

Now, if a man had an ax and was holding it over my head I would certainly tell him, get the heck away with that ax, but I don't see where—you are not going to quote me saying what his duty that he should have done this or shouldn't have.

Q. Now Mr. Robinson, we have to assume, I want you to assume certain things to be true. For instance, this Liberty vessel [37] was anchored in the harbor of Sasebo, Japan, lying in quiet water, and the liberty launch came alongside with these men, as far as the testimony goes, and I don't know whether that is complete, but you assume it for my question anyway that the only licensed officer on there was the Second Assistant Engineer.

A. All right.

Q. Now, and that when a man got on to the ladder of the ship, of the Augustin Daly he was on the ship——

A. But the Second wasn't, the only officer was still on the launch.

Q. He was standing on the launch, yes.

A. Yes.

Q. Now, under those circumstances and this man that was climbing the Jacob's ladder had these two bottles as I have described them before, and the testimony also is that he had had some drinks ashore. A. Uh-huh.

Q. Now, if this was a dangerous thing for this Third Cook to do in climbing the ladder in that

(Deposition of Ray H. Robinson.)

way, tell me, did the Second Assistant Engineer have any duty to warn him?

A. I can't see where duty comes into it at all. Supposing he was an oiler, the Second you are speaking of, it wouldn't have made any difference in duties whether he is an oiler, another mess boy or who he was because he was not aboard the [38] vessel at that time.

Q. All right.

A. Now, we might say if the Second was up on the deck and seeing this man coming up bringing liquor, it would throw a different light on it, he would have been an officer of the vessel and he would have been aboard the vessel.

Now, at that time there could be an argument about him fulfilling his duties of saying, you shouldn't be bringing this aboard, but where he stood down below, I think he should have kept his nose right out of the other guy's business, personally.

Q. Then I am right in saying that your testimony is that he had no duty under those circumstances that I just described while he is standing in the launch?

A. That is my belief that he didn't have any duty.

Q. Now, if the Second Assistant had been on the deck at that time, would he have had a duty to warn the man against the negligent manner in which he was climbing the ladder by being encumbered with these two bottles?

(Deposition of Ray H. Robinson.)

A. He would have undoubtedly if he was looking down and seeing the man wasn't able to come up we will say in a safe fashion, he probably would have told him or should have told him to hand down one of those packages, we won't say bottles, maybe they weren't, and how to come up safely. But, he would have been up there to start with, he wouldn't have [39] had nothing to do with that ladder that I can see. He is not in charge with the deck, he has nothing to do with the deck.

Q. I am just trying to find out what a Second Assistant's obligations are to protect members of the crew against injury when he sees them doing something that is endangering themselves.

A. It is his obligation as an officer and as a crew member to attempt to protect the lives of anyone aboard the vessel and the property of the company.

It is a known fact.

Q. That is what I thought was the fact but I wasn't sure until now that you felt that way.

A. But, he is supposed to protect himself too.

Q. That is correct.

A. And to people that don't go to sea, they see things in a heck of a different light.

You are living with say 54 men aboard the vessel. There must be a certain amount of harmony. There is friction between departments. We know we have the color problem which is very sad, it is race discrimination and if you give certain orders, it was for a long time the officer was catching the devil.

Now, this fellow you are speaking of, Mr. Farley,

(Deposition of Ray H. Robinson.)

isn't the aggressive type I will say, never was. He never butted [40] in any disputes with the crew and he just was sort of a happy go lucky guy and had very little trouble.

There is many of them that tend to give orders to everyone and butt in and boisterous and they would probably have done different than Farley did, but he is not the aggressive type and he just live and let live, I presume is what that was.

Mr. Krause: I think that is all, Mr. Robinson. Thank you.

### Redirect Examination

Q. (By Mr. Williams): Mr. Robinson, it is your testimony, is it not, that if we assume the Second Assistant Engineer is standing down in a liberty launch alongside a vessel and he observes a Third Assistant Cook attempting to climb the ladder while intoxicated or in a negligent manner such as holding on to packages or bottles while attempting to climb, that he has a moral obligation always to warn him if he sees him doing it?

A. That's right, to help his fellow man regardless of color, creed or anything else. You are supposed to help the other fellow.

Q. And, if he observes him doing this you feel that as a matter of self preservation he should not be immediately under the ladder?

A. That's right, he should be in as safe a place as it is [41] possible to be. That is what I would say.

Q. Now, let us suppose that this Second Assist-



(Deposition of Ray H. Robinson.)

ant Engineer was ten feet away from the Jacob's ladder standing on the liberty launch at the time the man was going up the ladder, the Third Assistant Cook, the manner in which we have described, do you say that he had the duty to protect himself when he is that far removed from the ladder?

A. Well, if he is ten feet away from the ladder, normally he has protected himself.

If he is ten feet away. He must have been on a pretty good sized boat or damn few guys on it.

Q. Suppose he was five feet away, would that normally take him out of the area of danger?

A. No, a man could fall out five feet. He may in his own mind, he probably felt he was out of danger if he was five feet, but it is very possible for a man to hit you. Five feet isn't so far back, but it isn't directly below the man.

Q. Now, first of all, do you feel that a vessel anchored in a harbor—I am asking your opinion on this question, whether a vessel anchored in a harbor, assume further that it will be there for five days, a Liberty vessel, is it your opinion that a Jacob's ladder as compared we will say to an accommodation ladder is a safe means of getting a crew ashore via a Liberty launch and back up to the boat again, keeping in mind the eccentricities of seamen ashore as you have previously [42] described.

Mr. Krause: I make an objection. In the first place the obligation of the ship owner is imposed by law to furnish a safe place, a safe method to get aboard and off of the ship, not the safest method.

(Deposition of Ray H. Robinson.)

Mr. Williams: Well, I don't believe I asked that.

Mr. Krause: You asked if the accommodation ladder was safer than the Jacob's ladder, didn't you?

Mr. Williams: If I did I don't mean to ask that. Read it back.

(Whereupon the Reporter read the previous question.)

Mr. Williams: Are you satisfied with the question then?

Mr. Krause: I won't make the objection. There isn't a comparison being made.

Mr. Williams: I may ask him that later. I don't ask him that at this time.

The Witness: I will say, regardless of what that ladder was there, we will say they were acting in accordance with the law, it doesn't state it must be one kind of a ladder or another, and they both have been used for years and years and years and hundreds of thousands of men have went up and down them, so I wouldn't attempt to say which is the safer or isn't the safer, it is up to the Master of the ship and the company to decide what type of a ladder to put there for the men to come up and down. [43]

As long as it is within the law I can't see where——

Q. Mr. Robinson, when crews return from liberty ashore, is it customary and a usual thing to have either an officer or a sailor on deck watch to observe and perhaps assist their return to the vessel from the liberty launch?

(Deposition of Ray H. Robinson.)

A. Well, I might state that upon many and many occasions that I have come back there has been no one on the deck right at that moment. There is always a deck officer on watch but that doesn't mean that he is supposed to stand right there at that spot. If you have a gangplank, usually if you have a ladder there where the peddlers can come aboard and the likes of that, well there is someone there to check them. But, as far as the assisting part, on many occasions I will say I have come aboard and there hasn't been anyone there to help.

Q. Well, you say that you have observed occasions where there was no one on hand?

A. That's right. There is someone on duty at all times.

Q. Isn't there normally an officer or another sailor there? A. A sailor on gangplank watch.

Q. On gangplank watch. Not necessarily gangplank watch, that would assume being alongside of a dock.

A. Yes. Peddlers coming aboard you got to have them the same as a watchman.

Q. Is there not normally a deck officer or a sailor there to [44] prevent we will say the bringing aboard contraband articles or bringing aboard unauthorized persons?

A. There is someone in the Deck Department assigned to what I say a gangplank watch. There is a gangplank watch, he is there to watch who is coming aboard. Then there is always an officer in charge, but he doesn't necessarily stand right there

(Deposition of Ray H. Robinson.)

by the gangway, but there is someone alerted we will say. He is on duty.

Q. For the return?

A. Night watch or in the daytime there is someone there. They have the regular watches. There is an officer on duty below and on deck at all times.

Q. What about the return to this ship from a liberty launch of intoxicated ship personnel? Now, if an officer is in charge there, does he give some directions or something of that nature as to getting those persons on board the ship safely?

A. If the officer were standing there on the top of the gangway and noticed anything wrong, he perhaps would give orders, but I don't know if there was an officer standing there or not.

I say there was a gangplank watchman or a man on watch, supposed to be on watch. There is a sailor assigned to that, but an officer isn't required to stand by that gangway at all times. On passenger ships you have a quartermaster [45] assigned to this gangway and there is an officer on duty, but not necessarily right at that gangplank.

Q. Well, is it the function of the gangplank watch as you describe it to observe men coming aboard the ship improperly and to do something to correct it if it is necessary, particularly if they are intoxicated? A. Well—

Q. Not just an officer, but anyone?

A. I might quote this as probably experiences and everything, is the only way I can do, is saying supposing there was a seaman at the head of the



(Deposition of Ray H. Robinson.)

gangplank and his buddy was intoxicated, do you mean that he is going to stool and squeal and holler that the guy is drunk and get him in trouble.

We have a Police state here it seems like you are trying to bring out.

I see you people haven't gone to sea and don't know anything about seamen. You should have seamen trying seamen I think and we would probably get the facts out of the thing.

Q. That may be true, I think you missed the point of my question. It is really whether they should do something to warn or to see that those men get aboard safely rather than get injured trying to come aboard the ship. Isn't that one of their functions as a watch, to try to get the men aboard the ship safely? A. That's right. [46]

Q. It is not unusual that a man comes back intoxicated to a greater or lesser extent?

A. But, we will say about this, we will go back—now, I am probably butting into this but the man has this liquor bringing it aboard. The man up there, this sailor at the top of the gangway, I don't think he is going to yell to him, lay that package or those down, that liquor down aboard that launch.

Q. Don't you think it would be proper for him to say, put them inside of your shirt?

A. It would be very proper for him to state, put them inside of your pocket or your shirt.

Q. Get your hands free?

A. Or anything else, we know that.

Q. I mean, as to his safety, that is all I am

(Deposition of Ray H. Robinson.)

inquiring about as to the safety of the men coming aboard and as to the safety of the other men down in the liberty launch upon whom he might fall if he was ascending the ladder in that manner?

A. All of the vessels and up to today it is preached safety. There is posters of safety, the men are told and taught safety, so every individual crew member, whether it is the Captain or the mess boy has certainly been told that safety is a very cardinal issue aboard a vessel.

Mr. Williams: I have no further questions except for [47] the usual one about the reading and signing of the deposition.

Mr. Krause: I have nothing further either.

Mr. Williams: Mr. Robinson, under the Rules of the Court and the Law of Civil Procedure, you have the right to, after your deposition is transcribed and in typewritten form here, read that deposition over, and if there are any errors to correct them and then sign it or you may waive that right.

I feel sure that the Reporter has taken your testimony accurately and you may do as you wish.

What do you wish to do?

The Witness: My time is very limited and I am sorry if I got a little bit hot headed but I will waive the right to signing this because I am leaving for San Francisco and I know that nobody here is attempting to put me on the spot, and I am trying my best to help everyone involved here. Not being at the scene of this accident, I just can't give a true picture of various things. The condition of the

(Deposition of Ray H. Robinson.)

man, the size of the boat, the weather and there are so many factors in it that could change a little bit, but I have tried to answer the questions to the best of my ability and experience of going to sea.

Mr. Williams: Mr. Robinson, do you also waive the reading it?

The Witness: Yes.

Mr. Williams: You waive both reading and signing? [48]

The Witness: That's right.

Mr. Williams: Thank you very much.

Further Deponent Saith Not

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[Endorsed]: Filed July 27, 1955. [49]

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## RESPONDENTS' EXHIBIT No. 2

### DEPOSITION OF GLENN E. MORGAN

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#### GLENN E. MORGAN

called as a witness at the instance of the Respondents, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Kennedy): Would you state your name, please? A. Glenn E. Morgan.

Q. What is your present address, Mr. Morgan?

A. Post Office Box 423, Portland 7, Oregon.

Q. That is your home address?

A. My permanent mailing address, yes.

Q. Presently you are sailing aboard the *Permante Silver Bow*, are you not?

(Deposition of Glenn E. Morgan.)

A. That is right.

Q. Do you know where you are going to be within the next month? A. Not exactly, no.

Q. Will you continuously be going to sea?

A. Yes; that is my only occupation.

Q. Your only occupation is that of a seaman?

A. That is right.

Q. What normal trip does the vessel take?

A. Well, this ship varies on its trips. I might run to Honolulu and from there go back to California or we might go to Mexico. [4]

Q. How long, normally, are you in port when you are in port?

A. Probably 42 hours at the most, normally.

Q. Do you expect to be anywhere in the State of Oregon within the next three or four months?

A. I have no idea what the future operating schedule of this ship is.

Q. Do you expect to remain aboard this vessel during the next three or four months?

A. At the present time I would say yes.

Q. How old are you, Mr. Morgan? A. 49.

Q. How long have you been going to sea?

A. Thirty years.

Q. In what department have you sailed?

A. Deck department.

Q. What license do you hold, if any?

A. Master.

Q. What are you sailing as now, Mr. Morgan?

A. Able seaman.

Q. Shipping is a little tough right now, isn't it?



(Deposition of Glenn E. Morgan.)

A. Yes, sir.

Q. Have you sailed as Master, Mr. Morgan?

A. Yes, sir, I have.

Q. How long was that and when? [5]

A. As a total probably two years over a period of time, which I might have been back to Chief Mate at various times.

Q. How long ago was that that you sailed as Master?

A. The last ship on which I was Master was in 1948.

Q. Have you sailed as Chief Mate? A. Yes.

Q. About how long a total time did you sail as Chief Mate, to your best recollection?

A. I would say five years.

Q. Did you sail as Second or Third Mate, also?

A. No.

Q. You never sailed as Second or Third Mate?

A. No, sir; unless you want to count a two-week trip to Europe as Second Mate.

Q. Are you married? A. Yes.

Q. Mr. Morgan, did you serve on the S. S. Augustin Daly? A. Yes, I did.

Q. In what capacity? A. As Chief Mate.

Q. How long were you aboard the ship?

A. Seven and a half months.

Q. Do you remember when you first went aboard the [6] vessel?

A. It was either the first or second of February, 1952.

Q. Approximately when did you leave the ves-

(Deposition of Glenn E. Morgan.)

sel?      A. The 27th or 28th of August, 1952.

Q. Where was the vessel when you first went aboard?

A. Willamette Shipyard, Portland, Oregon; the proper name would be the Willamette Iron and Steel, now.

Q. What type of articles did you sign aboard that vessel?      A. Foreign.

Q. Approximately when did you leave Portland?

A. Early in March. I don't recall the exact date.

Q. Where were you bound for?

A. The Far East.

Q. Do you remember what type of cargo you had aboard?      A. Lumber but it was military.

Q. I don't understand; was it military equipment?

A. No. It was lumber but it was military equipment.

Q. I see. It was an M.S.T.S. vessel?

A. That is right.

Q. Do you have any deck cargo aboard the vessel?      A. Yes, we did—a full deck load.

Q. Was it a particularly heavy deck load or how would you describe it?

A. Yes, it was heavy. The type of lumber would be creosote pilings, heavy squares—timbers—and [7] Army Engineer packaged bridge materials.

Q. Were you carrying a deck cargo over all of the hatches?      A. Yes.

(Deposition of Glenn E. Morgan.)

Q. What was your first port after leaving Portland?  
A. Sasebo.

Q. Do you remember approximately when you arrived there?

Mr. Kennedy: Unless there is an objection I have the rough log of the Augustin Daly covering the period February 9, 1952 and ending April 10th, 1952. I don't believe there is any question about the authenticity of the log, is there, Mr. Williams?

Mr. Williams: No.

Q. (By Mr. Kennedy): I am handing you the log at this time, Mr. Morgan and you can refresh your memory from that.

A. On April 1st, 1952.

Q. You arrived there April 1st, 1952?

A. That is correct; at 2230 hours.

Q. Were you then in an outer harbor or in the inner harbor?

A. We were outside, in the open sea.

Q. Did you then later proceed into the inner harbor?  
A. The following morning.

Q. Would that be on April 2nd? [8]

A. April 2nd; that would be correct.

Q. At what time did you arrive in the inner harbor?

A. We did proceed directly into port, but it was after midnight, so that would be on the 2nd.

Q. On April 2nd?  
A. On April 2nd, yes.

Q. When you arrived there in Sasebo, how was the vessel handling at that time?

(Deposition of Glenn E. Morgan.)

A. In what way do you mean by handling,—steering?

Q. How as its stability?

A. The vessel was very tender.

Q. What do you mean by being tender?

A. The center of gravity was very high. It was above normal for a stable ship.

Q. Would that cause the ship to do any particular thing—the fact that the center of gravity was high?

A. Yes; it would cause it to list one way or the other.

Q. Would there be any sudden lurches?

A. It is possible.

Q. Were there?           A. There were.

Q. Did you have any trouble with the ship in that respect before you arrived at Sasebo?

A. Yes, we did, for a number of days prior to our arrival. [9]

Q. If I understand you correctly, the term “a ship being tender” means that it will take lists at various times?

A. That is right; which is entirely different from the roll of a ship in a sea. With a list, a vessel will lay over to one side and remain there. You still might have a list and be rolling, also.

Q. How much of a list were you taking during these times before you arrived at Sasebo?

A. Do you mean when we would heel?

Q. I was trying to get an idea of how much of a list?



(Deposition of Glenn E. Morgan.)

A. At a time when she would heal over or be in more or less of a permanent——

Q. Let me ask you this: You stated, if I understood you correctly, that the ship was somewhat tender before you arrived at Sasebo, is that correct?

A. That is correct.

Q. How much of a temporary list would you take? A. Well, when she would——

Q. Let's call it a lurch and not more or less a permanent list?

A. When she would list over, the initial list might be as high as twenty degrees. Then she would steady up and maybe at eight or ten degrees she would be permanent for some time. [10]

Q. For some time; and then it would straighten herself out? A. Well——

Q. Or did you always have some permanent degree of list?

A. When the vessel came back to near normal, it was due to transferring oil in the double bottoms of the ship, trying to counteract the list,—eliminate it.

Q. Would it list on just one side or both sides?

A. One; and then later it would go the other way.

Q. Is that also what you mean by being tender—that she lists from one side to the other?

A. That is being tender, yes.

Q. Do you know why the vessel was tender?

A. Due to the fact that we had a heavy deck load,—what we would term a full deck load—plus

(Deposition of Glenn E. Morgan.)

the combination of bad weather, seas coming aboard, the lumber cargo on deck absorbing or retaining quantities of this water, and our consumption of oil and fresh water from our tanks in the bottom of the ship which would have a tendency to increase the weight on top and lessen it on the bottom of the ship.

Q. What about your water?

A. Fresh water, do you mean?

Q. Yes. Were you using water all of the time in the course of your water supply becoming lower?

A. Yes. There was the boiler feed, culinary, bathing and everything.

Q. What difference would the fact that you were taking on seas on the deck cargo have with respect to stability?

A. It would increase your weight above your decks,—above your normal center of gravity.

Q. Do you mean the lumber was getting somewhat waterlogged or something to that respect?

A. It was becoming heavier, yes.

Q. What was the condition of the vessel when you arrived at Sasebo?

A. She was very tender, and we had some list. I don't recall——

Q. Do you want to refer to the log, Mr. Morgan?

A. (Witness refers to log). We didn't even have an entry of the amount of list at the time of arrival.

Q. What is your recollection of the list, Mr. Morgan?

(Deposition of Glenn E. Morgan.)

A. Here it is: "Arrival with a twelve degree port list."

Q. That is what is stated in the log book, is that right?      A. That is right.

Q. Is that your recollection of the list, also?

A. The amount I do not recall,—and whether it was port or starboard I do not recall, although I do definitely recollect that we had a list at the time of [12] arrival.

Q. Do you remember how much oil and water you had at the time you arrived?

A. From memory, no; but from the log book I can.

Q. Do you want to take a look at the log book?

A. 2700 barrels of fuel oil which would be approximately four hundred tons; and 206 tons of fresh water.

Q. What is the total amount of oil that one of these ships can take aboard it, Mr. Morgan? I believe this was a Liberty Ship, is that correct?

A. I believe it was a Liberty Ship.

Q. I asked two questions there. Do you remember my first question—how much oil could you take aboard?

A. It was normally known as the oil tanks which is the vessel's double bottoms. I would say it would take approximately seven thousand barrels if you bunkered to capacity in your double bottoms.

Q. What was the purpose of the vessel going to Japan?      A. Those were our Naval orders.

Q. Did you discharge any cargo there?

(Deposition of Glenn E. Morgan.)

A. Yes.

Q. What were you discharging?

A. We discharged the deck cargo.

Q. You discharged the total deck cargo? [13]

A. Yes.

Q. Any from the holds, if you remember?

A. Some,—a small amount. If I remember correctly, the packaged bridge material was divided between the holds and the deck. Some of the bridge materials was discharged from the holds.

Q. Who was doing the unloading; was it the crew or longshoremen?

A. Japanese longshoremen.

Q. Did the ship provide shore leave after it arrived at Sasebo? . . . A. Yes.

Q. Do you remember approximately when?

A. There would be shore leave every afternoon; but under military occupation there was a curfew and as near as I can remember at the moment, the curfew was midnight at the dock. It was a launch landing.

Q. How did the crew get ashore?

A. By launch provided by the agents for the vessel.

Q. Did you rig any means of getting on or off the vessel when you arrived at the inner harbor?

A. We put out a type of ladder that would be known as a pilot or Jacob's ladder.

Q. Would you describe the condition of that Jacob's ladder? [14]



(Deposition of Glenn E. Morgan.)

A. The physical condition of it was excellent—the materials—and all in good order.

Q. Was it a standard form of Jacob's ladder, if there is such a thing?

A. One of the standard forms. There are several types.

Q. In your experience of sailing, Mr. Morgan, did they use this type of Jacob's ladder on other ships?

A. Oh, yes.

Q. Was it as good as other forms of Jacob's ladders?

A. I would say yes. That is a matter of individual opinion.

Q. Maybe you had better describe how a Jacob's ladder is constructed?

A. You have wooden steps which usually have side pieces—or not usually—they do have side pieces. They have either one flat cross-piece between them—one type; and other type would have two round wooden pieces which are parallel to each other as a cross member. These steps are joined together by rope to form a succession of steps.

Q. How was this Jacob's ladder secured?

A. To the permanent pipe rail on the boat deck.

Q. And then was it secured below, down by the waterline, or did it hang free?

A. It hung free at the waterline, and the lower end was [15] far enough above the water that if a launch came alongside, a launch would come just under the end of the ladder—or the majority of the launches, I should say, the deck would be just un-

(Deposition of Glenn E. Morgan.)

der the bottom rung or bottom step of the ladder.

Q. Was that true with respect to the shore leave launch that was being used?

A. I think the bottom step of the ladder rested on the deck of the launch which was used for shore liberty.

Q. Is it normal and customary or is it not customary to have the bottom of the Jacob's ladder free?

A. You have no means to secure it. It is hanging against the side of the ship.

Q. Then is your answer that it is normal and customary to let it hang free?

A. Yes, it is.

Q. The reason being that you can not secure it, is that right?      A. That is right.

Q. Was that Jacob's ladder rigged in the same manner that you have described during the vessel's stay at Sasebo, Japan?      A. Yes.

Q. Did the ship have an accommodation ladder aboard?      A. It did. [16]

Q. I wonder if you could describe the accommodation ladder?

A. The two heavy side pieces, placed parallel with smaller cross pieces between them, approximately a foot apart in a parallel line, formed a series of steps.

Q. Were the steps rigid or were they flexible?

A. On a Liberty Ship, the ordinary type of accommodation ladder is rigid steps.

Q. Did you have rigid steps aboard the Au-

(Deposition of Glenn E. Morgan.)

gustine Daly?           A. We did.

Q. How would you normally regulate this accommodation ladder?

A. The upper end is secured to a platform which folds out from the ship's side to a horizontal position. The upper end of the ladder is secured to this platform by bolts. The lower end would be supported by a chain bridle which, in turn, would be held by a block and pawl from one of the davits.

Q. Did this accommodation ladder have stanchions on it—did it have a handrail?

A. It had removable stanchions and a rope handrail which is threaded through an eye that forms the top of the stanchion.

Q. When you arrived at Sasebo was the ship quite deep in the water,—or will you just describe how [17] the ship was.

A. Yes; we were quite deep. We had a mean draft of 25 feet, I believe.

Q. You may refer to the log book, Mr. Morgan.

A. (Witness refers to log book.) The mean draft was 25 feet and no inches, on arrival.

Q. Does that indicate that she was deeply loaded or just what does it indicate?

A. It would indicate she was deeply loaded because the maximum mean draft would be 27 feet 8¾ inches.

Q. That would be your maximum mean draft?

A. That would be the maximum mean draft, yes.

Q. Does it make any difference when using an accommodation ladder whether the ship is deeply loaded or not?

(Deposition of Glenn E. Morgan.)

A. I would say that would depend upon the type and length of the ladder.

Q. Would it make any difference on the Augustine Daly?

A. With the type of ladder we had there, rigid steps, and with the vessel deeply loaded and the accommodation ladder in place to use, the angle of the ladder would be very close to horizontal. Therefore, with the rigid type of step, any person using that ladder would be walking on the edge of the steps rather than the flat of it.

Q. Would that leave any open spaces between the steps? [18]

A. Yes, it would,—the fixed distance between the steps.

Q. In other words,—and correct me if I am wrong—with the deep draft, the steps in the accommodation ladder,—the steps, themselves, would be more vertical? A. Correct.

Q. And you would be walking on the top part of that step, is that correct?

A. That is right,—the edge of it.

Q. The edge of the step? A. Yes.

Q. Instead of walking on the flat portion, is that correct? A. Yes.

Q. Would it make any difference, Mr. Morgan, with respect to handrails,—the fact that the vessel was deeply loaded?

A. The type of handrails we had for accommodation ladders on the Augustine Daly were short. Although they are set into sockets, which would be



(Deposition of Glenn E. Morgan.)

at right-angles to the side of the ladder, with the small angle from the horizontal you wouldn't get the full benefit of the stanchions. You would be inclined to have to stoop in order to reach the hand-rail.

Q. This type of accommodation ladder that was used on [19] the *Augustine Daly*, is that in general use as far as your experience on that type of ship?

A. Yes. A standard two-section ladder is used for an accommodation ladder.

Q. After your arrival at Sasebo did you have any conferences with the Captain with respect to using the ladder?           A. Yes.

Q. Did you discuss the question of whether to use the accommodation ladder or a Jacob's ladder with the Captain?

A. That was part of the discussion.

Q. What was the result of that conference with the Captain,—I mean with respect to what you did after that?

A. We used the pilot ladder instead of the accommodation ladder.

Mr. Kennedy: For the record, Mr. Williams, I believe we are in agreement that pilot ladder or Jacob's ladder is used interchangeably?

Mr. Williams: By this witness, yes.

Q. (By Mr. Kennedy): This Jacob's ladder, was that the only means of ingress and egress to the vessel—that is, coming on board or going ashore?

A. Yes.

(Deposition of Glenn E. Morgan.)

Q. Were the longshoremen using that Jacob's ladder? [20]      A. They were.

Q. I wonder if you could describe, generally, the people that came aboard,—did you have a large number of people or a small number, at that time?

A. We had large numbers. There were approximately 75 longshoremen on the ship and then we had port officials—Japanese. We had military and naval port officials and others who were concerned about the cargo,—various branches of the military. We had the ship's crew.

Q. About how many shifts of longshoremen were you using a day?      A. Two.

Q. Do you recall an injury that took place to John Farley, a Second Engineer aboard the vessel?

A. I do.

Q. I wonder if you could explain in your own words what you were doing at about the time of the accident and what happened afterwards?

A. I went on watch at midnight to take the remainder of the night watch.

Q. What day was that? You can refer to the log, if you want?

A. (Witness refers to the log.) Midnight, April 5th. My watch would have been from 000 to 0800 hours. [21]

Q. To 0800 on the 6th?

A. On the 6th, yes. After taking the watch, I made a tour of the ship. I then went back to my room and started doing some paper work that I was a little behind on and I was waiting for the

(Deposition of Glenn E. Morgan.)

liberty party to return. About 0040 hours, while in my room, doing my paper work, I heard the launch, so I started down to the gangway. I went through the inside passage where I would meet the returning crew members when they came over the rail onto the main deck. Just before I arrived out on deck, I heard a lot of commotion on the launch. As soon as I was in a position where I could see, I saw Mr. Farley lying on the deck of the launch. Someone told me that he had been injured.

Q. Just a minute. You can't say what someone told you.

A. Oh. So I climbed down into the launch to see what the trouble was with Mr. Farley. And he——

Q. Just what you saw, Mr. Morgan or what Mr. Farley said.

A. Can I include what he said?

Q. You can include what Mr. Farley said.

A. I wanted to know what happened and, as near as I can recall now, Mr. Farley said that he had been hurt and was in considerable pain.

Q. Where did Mr. Farley go after that?

A. I kept him on the launch and sent him back to shore to [22] the hospital.

Q. Did you know exactly when the launch would be returning, each night, or that night?

A. There was never an exact minute due to tidal conditions. The time of departure from the dock was supposed to be midnight but that didn't necessarily mean right on the stroke of the bell. Men boarding the launch at the landing might delay it

(Deposition of Glenn E. Morgan.)

five minutes. There was no exact minute that the launch could arrive.

Q. In other words, I take it your answer is that you didn't know exactly when it was returning?

A. Only approximately.

Q. Would you describe the condition of the lights, that night that Farley was hurt?

A. All deck lights were on which would be lights on the masts, lights of outside passageways and around the deckhouse on the upper decks. I also had a cargo light rigged so that it would shine down on the pilot ladder.

Q. Was the cargo light shining down on the pilot ladder?      A. Yes.

Q. These passageway lights that you testified to,—were there passageway lights on near the Jacob's ladder?

A. There was one that would be in that vicinity. I don't recall for sure. I am not sure. [23]

Q. When did the vessel leave Sasebo, Mr. Morgan?      A. On April 6th.

Q. What time did it leave on April 6th?

A. Departure was at 11:30 a.m.

Mr. Kennedy: I believe that is all.

### Cross Examination

Q. (By Mr. Williams): Mr. Morgan, do you know where the ship took on fuel oil before it left the United States, the voyage of the S.S. Augustine Daly that we have been discussing?



(Deposition of Glenn E. Morgan.)

A. We took our bunkers of fuel oil in Portland, Oregon, prior to departure.

Q. Do you know how many barrels of oil the ship took aboard, at that time?

A. On February 10th we received 3600 barrels. I am in error, there—that was the amount of fuel on hand leaving Portland, Oregon, for Coos Bay, Oregon.

On February 26th we received 4399 barrels of fuel oil.

Q. Can you tell me how many barrels of fuel oil you had when you left the States; what does the log indicate?

A. That day we had over 7000 barrels aboard.

Q. Is that your estimate, Mr. Morgan, or does the log show that? [24]

A. The log shows it.

Q. Exactly what does the log show for barrels, if it does so show?

A. On February 26th, after receiving bunkers, we had a total of 7180 barrels on board.

Q. On February——

A. 26th.

Q. And that would be in Coos Bay, would it?

A. No,—in Portland.

Q. You then returned to Portland, did you?

A. Yes. We departed but we returned.

Q. The ship went to Coos Bay to pick up a lumber cargo, was it?

A. On this February 26th departure we sailed for Yokohama but we had a collision in the river and we returned to Portland for repairs. Our actual sailing for Japan was on March 6th.

(Deposition of Glenn E. Morgan.)

Q. Can you tell me the amount of fuel oil you had on hand on that date?

A. 6830 barrels; and we had 440 tons of water.

Q. For the voyage across it took about 28 days, is that right—or 24 days—how many days would it take?

A. If I remember correctly, it was 24 days and some odd hours.

Q. When did you start having trouble with the list—or [25] the tenderness of the vessel that you have spoken of?

A. As I recall, it would have been around the 20th of March when we first started showing signs of being tender.

Q. That would be about ten days prior to your arrival in Sasebo, is that right?

A. Yes; as near as I can recall.

Q. What did you say the capacity for fuel was on that vessel—around 7000 barrels?

A. Approximately 7000 barrels, yes—using the double bottoms only.

Q. If the deep tanks are used the capacity is very considerably increased, is it not?

A. Yes, it is.

Q. Up to what—11,000 or 12,000?

A. Using number three deeps it probably increased it to 11,000 barrels or so.

Q. Mr. Morgan, is it normal that a ship takes on just enough oil to get it across; is that normal sailing procedure?

(Deposition of Glenn E. Morgan.)

A. Just enough? No. You always have a safety margin.

Q. In addition to that, is it considered to be good seamanship to take enough oil to provide ballast so that your ship will not be tender in riding over—or is a tender ship a perfectly normal thing?

A. No.

Q. It is not a normal thing? A. No.

Q. I believe you stated that the lightness of fuel oil is one of things that caused the ship to be tender?

A. That was one of the factors.

Q. And your fresh water supplies, also?

A. Yes.

Mr. Kennedy: And the heavy deck load, also.

Q. (By Mr. Williams): You say that a tender ship is not a normal way to sail, and a voyage is usually so planned that a ship will never be tender at any time, is that not right?

A. It should not be tender.

Q. If the ship had simply taken on more oil would it or would it not have been tender, if you know—if you had taken on more oil in the United States?

A. Upon our departure from the United States we were at approximately the maximum draft.

Q. And you were loaded with cargo so heavily that you could not take on any more oil, is that correct?

A. We were down to approximately the permissible sailing draft which we could not have taken on any more cargo [27] or oil. We might

(Deposition of Glenn E. Morgan.)

have replenished a couple of hundred barrels which would have been a negligible factor.

Q. Could the ship have come into a port on the way across and fueled up again to provide it with more ballast?

A. Following our routings, as given to us by the Navy, we made no other port.

Q. The Navy directed your routings, is that correct? A. That is right.

Q. Mr. Morgan, are there other ways of stabilizing a ship besides just putting a sufficient amount of oil and water in it and proper cargo loading; are there other methods of preventing tenderness of a ship?

A. On a voyage, you consume oil. To counteract the inclination to become tender, it is a practice that you replace the oil in empty tanks with salt water as ballast.

Q. Was that done on this particular voyage?

A. Not to my recollection.

Q. That would be a factor in the tenderness of a ship, would it not,—balancing with sea water the empty double-bottom fuel tanks?

A. Yes; that would retain the original buoyancy of the ship. [28]

Q. The buoyancy that the ship had when it left?

A. Yes.

Q. Do slack fuel tanks have a tendency to cause unusual tenderness in a ship?

A. If the amount of slackness of a pair of tanks, that is, the same tank—port and starboard—was



(Deposition of Glenn E. Morgan.)

the same, it shouldn't cause any tendency to be tender. If they were unequal, it might give you a slight list.

Q. If, say, a starboard Number 3 tank was hard and the port Number 3 tank was slack, would that have a tendency to cause tenderness in the ship?

A. It would depend on how slack the tank was. If it were full without being pressed up tight—"hard" as you described—it wouldn't amount to any appreciable amount.

Q. If the tank was full as distinguished from being actually quite hard, is that what you are referring to?      A. Yes.

Q. So far as you know, the tanks were not ballasted with sea water on the way across?

A. To my recollection, no.

Q. When the ship arrived in port, was there any ballasting with sea water done, then?

A. No; I do not recall. [29]

Q. Mr. Morgan, when you said the Jacob's ladder or the pilot ladder that you referred to was secured to the permanent pipe rail on the boat deck, would you describe a little more fully exactly where that is located?

A. The boat deck is one deck above the main deck of the midship or house section of the vessel. The house sets further inboard from the ship's side. Around the outer part of the boat deck, at the ship's side there is a rail which is approximately three feet high. It is made of pipe and stanchions which

(Deposition of Glenn E. Morgan.)

are secured to the deck, forming a permanent, solid rail.

Q. And that is the rail to which this Jacob's ladder was fastened, was it? A. That is right.

Q. Did the Jacob's ladder from there go over the rail of the main deck or did the boat deck project farther out from the main deck?

A. They are both the same.

Q. Where would men board the Jacob's ladder in leaving the ship?

A. The majority would do so at the main deck level.

Q. Mr. Morgan, do you know if the U. S. Augustin Daly, while in port at Sasebo, Japan, on April 1st [30] to April 6th, 1952 had one or more than one accommodation ladder, if you know?

A. Only one.

Q. Your answer is that they had only one?

A. Only one, yes.

Q. Is it customary for Liberty Ships to carry more than one type of accommodation ladder?

A. Sometimes they carry two,—usually of the same type.

Q. Why do they carry two, if you know?

A. In case of storms,—if one is damaged. Also, it is to facilitate handling. At one dock you might be starboard side to and at another dock port side to.

Q. The type of accommodation ladder which you have described as being aboard the Augustin Daly is unlike the type of gangway ladder which is

(Deposition of Glenn E. Morgan.)

aboard this ship that we are on right now, is that correct?      A. They are not the same.

Q. Would you describe in what manner they differ?

A. The gangway on board this ship is what they call a brow gangway. Usually, when in use, it extends at right-angles from a ship to the dock.

Q. This type of accommodation ladder is not used alongside a ship?

A. On occasions they do but very seldom.

Q. The type of accommodation ladder which you referred [31] to, Mr. Morgan, as being aboard the Augustin Daly, in the Port of Sasebo, Japan, in April, 1952, was in two sections, is that right?

A. That is right.

Q. How long was each section?

A. Ten or twelve feet.

Q. You stated that this particular accommodation ladder had very short stanchions so that the handrails were lower than the normal ones, is that correct?      A. Yes.

Q. What is the normal height from the tread to the top of the stanchion; is it about 36 inches or more or less or do you know?

A. I would say that the normal or average stanchions for an accommodation ladder are 30 inches, more or less.

Q. 30 inches, more or less?      A. Yes.

Q. And the stanchions for this one were less than that?

A. Yes; to my recollection they were.

(Deposition of Glenn E. Morgan.)

Q. Would you say six inches less in that would be a 24-inch stanchion?

A. As near as I can remember, 24-inch might have been what they were.

Q. And that was a factor in thinking why this particular type of accommodation ladder should not be used? [32]

Mr. Kennedy: He didn't testify to that, Mr. Williams.

Mr. Williams: My question will ferret out whether or not he did so testify. I think he did.

Mr. Kennedy: If you want to ask him his opinion as to whether it should be used or not, I think you have a perfect right to ask that, but he wasn't asked that on direct.

Mr. Williams: Mr. Kennedy, the witness answered that there were several factors which to his mind made the use of an accommodation ladder not preferable to a Jacob's ladder. This is one of the factors that was mentioned by him.

Mr. Kennedy: I don't recall that exact testimony, but go ahead.

(The last question read by the Reporter.)

Q. (By Mr. Williams): In Sasebo, Japan?

A. As I understood the question, it was my thinking.

Q. Yes. I meant in that question to state what I thought your testimony had been. I will ask you the question now?

A. I have never made a statement, one way or



(Deposition of Glenn E. Morgan.)

the other, in regard to which ladder should have been used.

Q. Mr. Morgan, do you think that the short [33] stanchions on the accommodation ladder which was aboard the S. S. Augustin Daly in Sasebo, Japan, in April of 1952, rendered that ladder less advisable for use for ingress and egress from the vessel under the conditions then and there prevailing? A. No, I don't.

Q. It is your testimony then that the short stanchions on the accommodation ladder had no bearing on the situation, at all?

A. I wouldn't say they had no bearing on it, but they were not as satisfactory as some other types of stanchion might be.

Q. Is it your testimony that they were not as satisfactory as a longer type stanchion?

A. As some other type of stanchion.

Q. Mr. Morgan, where on the ship is the platform located to which the accommodation ladder is fastened? A. Approximately amidships.

Q. Is it even or flush with the main deck?

A. A few inches above the level of the deck, itself.

Q. A few inches? A. Yes.

Q. What would you say would have been the distance from the main deck to the waterline when [34] the S. S. Augustin Daly arrived in Sasebo, Japan, on April 2nd, 1952, in feet?

A. Approximately twelve feet.

Q. Mr. Morgan, is there any reason why one

(Deposition of Glenn E. Morgan.)

section of the accommodation ladder could not have been used upon the arrival of the Augustin Daly, instead of two, so that the accommodation ladder would have afforded a fairly correct and level means of access to the liberty launch, by using one section instead of two?

Mr. Kennedy: I object to the form of that question as it is going into opinions. It goes far beyond a leading question.

Mr. Williams: It is cross examination, Mr. Kennedy. I am entitled to lead him as much as I wish on cross examination.

Mr. Kennedy: The witness hasn't shown any evidence of being hostile.

Mr. Williams: My understanding of the rules relative to that is that I may lead a witness on cross examination as much as I please without any qualifications as to hostility or anything else.

Mr. Kennedy: Would you read the question?

(Last question read by the Reporter.) [35]

Mr. Kennedy: I withdraw my objection.

A. We didn't use two sections. We didn't use the accommodation ladder.

Q. (By Mr. Williams): This is my question, Mr. Morgan: Is there any reason why one could not have been used instead of hooking two of them together; would that not have increased the angle that you are talking about so that the steps would be approximately horizontal?

A. Two sections in a continuous line would

(Deposition of Glenn E. Morgan.)

make a very small angle, from horizontal. One section would increase that angle.

Q. Go right ahead if you haven't finished your answer. I don't know whether you have finished your answer.

A. I don't know whether I have covered the entire question or not. Would you please read the question?

(Last question read by the Reporter.)

A. That is it.

Q. (By Mr. Williams): You have finished your question, have you? A. Yes.

Q. Do you know if one section of accommodation ladder, on the first day of your arrival in Sasebo, Japan, would have afforded a good and proper means of egress and ingress to and from [36] the vessel to a liberty launch?

A. I don't know if it would have afforded a good means on the day of arrival.

Q. Mr. Morgan, the draft of this vessel changed between the time it arrived and the time it left Sasebo, did it not? A. Yes.

Q. How many feet did it change, would you say? A. Approximately two feet.

Q. Two feet? A. Yes.

Q. Then not a great deal of cargo was unloaded from it—at least, not a great deal in weight?

A. The weight factor would have been 1200 tons, perhaps.

Q. 1200 tons, perhaps? A. Yes.

Q. Was the bulk of the cargo of the S.S. Au-

(Deposition of Glenn E. Morgan.)

gustin Daly discharged elsewhere—in Pusan or somewhere else?

A. The remainder was discharged in another port,—Pusan.

Q. Was the major part of it discharged elsewhere, or was the major part of the cargo discharged in Sasebo?

A. The major part of the cargo was discharged in Pusan.

Q. Do you know if all of the deck cargo had been unloaded by the 5th day of April? That would [37] have been the date of your departure. You may refer to the log.

A. Discharge at Sasebo was completed on April 5th.

Q. Mr. Morgan, it is possible to rig an accommodation ladder, is it not, with planking over the steps and cleats nailed onto the planks as a means of avoiding the steep steps?

A. Yes; it is possible.

Q. Have you seen that done?

A. Yes. I have done it, myself.

Q. Do you know if the Augustin Daly had any list after its deck cargo was discharged?

A. As near as I can recall, the vessel was on an even keel at the time of sailing.

Q. And the discharge of the cargo was completed sometime on the 5th of April, you say, or by then? A. Yes; on the night of the 5th.

Q. Mr. Morgan, about how long does it take to rig a pilot ladder aboard a ship for use?



(Deposition of Glenn E. Morgan.)

A. Not over five minutes.

Q. About how long does it take to rig an accommodation ladder?

A. The time would vary. If the accommodation ladder were in place on the side of the ship where it is used. On a Liberty ship there is a recess it can fold into. Sometimes you might have your [38] ladder back on Number 4 hatch, for stowage. So the time would vary. If it were in place, it would take perhaps half an hour.

Q. And if it were not, about how long would it take?

A. It could extend to two hours.

Q. Is an accommodation ladder generally regulated from the davits as the ship comes out of the water?

A. The lower end of the gangway would be raised or lowered, if necessary.

Q. Whose job is that?

A. A seaman would ordinarily do that by tackle.

Q. One of the deck crew?

A. Several of the deck crew.

Q. Does it take several men to do that?

A. Yes; because it is by manpower.

Q. Mr. Morgan, was there any other time during the voyage of this particular ship, when a Jacob's ladder was used for ingress and egress for the crew, other than at Sasebo?

A. I don't recall.

Q. Was an accommodation ladder used at all other times, so far as you know?

(Deposition of Glenn E. Morgan.)

A. I don't recall.

Q. You don't recall if it was used at all other times?      A. No.

Q. How many other ports did you stop in? [39]

A. Do you mean?

Q. After Sasebo — from Sasebo back to the United States?

A. I lost count of them, there were so many.

Q. Will you describe them chronologically as much as you can recall; where?      A. Pusan.

Q. From there?      A. Yokohama.

Q. From there?      A. Pusan.

Q. And from there?

A. It might have been to Massan and then to Yokohama.

Q. Where is Massan?

A. Thirty miles south of Pusan.

Q. You don't recall, at those various ports to which you have referred, whether or not a Jacob's ladder was used for shore liberty for the crew?

A. To the best of my recollection, at most ports one shore liberty was granted when the vessel was alongside of the dock.

Q. Do you recall when you entered the harbor at Yokohama whether or not you came alongside the dock?

A. Which time entering Yokohama? You never went directly to the dock. You would always have [40] to anchor and await clearance from Quarantine and then berthing orders.

Q. When shore liberty was given at Yokohama

(Deposition of Glenn E. Morgan.)

was that sometimes given when the ship was out of harbor and not alongside the dock?

A. I don't recall that we ever had shore liberty while the ship was lying at anchor or not at Yokohama.

Q. When the Augustin Daly was in the harbor at Japan, it was in behind a breakwater, was it not?

A. Not a breakwater. It is a landlocked harbor.

Q. A landlocked harbor? A. Yes.

Q. What was the condition of the water in there; was it smooth or rough?

A. It was smooth.

Q. Mr. Morgan, did you make the decision as to whether or not the accommodation ladder or a Jacob's ladder would be used in the port of Sasebo, or did someone else make that decision?

A. I did not make the decision.

Q. Did Captain Accurso make it; is that his decision to make? A. He made the decision.

Q. He made the decision? A. Yes. [41]

Q. It was not your decision? A. No, sir.

Q. Mr. Morgan, you referred to a cargo light as being fixed aboard the deck of the S.S. Augustin Daly while in the harbor at Sasebo, Japan, so that it would shine down on the Jacob's ladder or pilot ladder that was being used. Will you describe where it was fastened,—where in relation to the gunwale of the ship on the main deck?

A. I don't remember.

Q. I have particular reference, Mr. Morgan, as to whether it was hanging out over the side or

(Deposition of Glenn E. Morgan.)

was about flush with the deck or was back a ways or what?

A. I don't remember the location of it. If I did remember then I would know how it was fastened, but I don't even recall, now, where the light was located,—whether it was forward or aft of the ladder.

Q. Did you talk to a Mr. Potts who was the scullery man aboard the S.S. Augustin Daly, following Mr. Farley's accident?      A. No.

Q. You did not talk to him?      A. No.

Q. Did Mr. Farley ever tell you how he was injured, if you remember? [42]

A. I don't recall whether Mr. Farley did or not because of the confusion at the time and others who were there and giving me their account of what happened, so I can't recall, now, whether Mr. Farley told me or not.

Mr. Morgan, when crew members return from shore liberty, is it quite a usual and customary thing that they have been drinking?

Mr. Kennedy: If he can answer the question.

Mr. Williams: If he can answer it, yes.

A. I wouldn't say it was the general thing for everybody.

Q. (By Mr. Williams): Would you say it is customary among crew members?

A. Some individuals.

Q. Mr. Morgan, is it also customary among seaman returning from shore liberty that packages



(Deposition of Glenn E. Morgan.)

and purchases are brought with them—particularly when they are in a foreign country?

A. Foreign purchases, yes.

Q. How are those usually brought aboard the ship,—are they loaded separately or does the individual crew member bring his own purchases with him?

A. As a rule, individuals would bring their own possessions aboard.

Q. On the accommodation ladder which the [43] Augustin Daly had in Sasebo, Japan, in April of 1952, was it rigged with double handrails, if you know, or with single handrails?

A. I believe it was single.

Q. Do you recall definitely one way or another?

A. No.

Mr. Williams: I have no further questions.

### Redirect Examination

Q. (By Mr. Kennedy): Mr. Morgan, I believe you were asked or perhaps you testified that the ballasting of the vessel would be some factor with regard to the tenderness; would this be the only factor as far as the vessel was concerned?

A. It would reduce the tenderness somewhat.

Q. Would it be the sole factor or just one factor—would your deck load and your draft have some effect on it?

A. In smoother weather, the deck load would start drying out which would reduce the center of gravity and help to stabilize the ship.

(Deposition of Glenn E. Morgan.)

Q. You mean if you hadn't been taking so much water on the deck? A. Yes. [44]

Q. I believe you testified that you did not recall whether the ship was ballasted during the trip?

Mr. Williams: I object to that as not being his testimony. I believe he stated that not to his knowledge was it ballasted.

Mr. Kennedy: I have a note saying that at one time he did not recall.

Mr. Williams: I believe your testimony was that to your knowledge it was not ballasted. Go ahead.

Q. (By Mr. Kennedy): Mr. Morgan do you know whether the ship was ballasted or not during the voyage? A. No.

Q. Of your own knowledge, you do not know, is that your answer?

A. That is my answer, yes.

Q. You also testified that the Jacob's ladder was secured up on the boat deck, if I remember correctly, which would be one deck above the main deck? A. That is right.

Q. Would you explain why it was secured up on the boat deck?

A. The pilot ladder we used was a long ladder which would be suitable for use when the ship was [45] light or had no cargo aboard. It was all in one section. If we had used it on the main deck, because of the deep draft of the ship the excess portion of the ladder which was not used would be in the narrow passageway between the rail and

(Deposition of Glenn E. Morgan.)

the house and would obstruct the passage. So I had the ladder put over where it could be made fast on the pipe rail on the boat deck.

Q. Could it be secured easier or would it be less secure by securing it on the pipe on the boat deck?

A. It was more secure,—well, if I may back up on that, please. It would have been secure if I had had it rigged on the main deck but it was easier to secure it on the boat deck, in addition to having a clear passage.

Q. Would it have been safer to secure it one place than the other?

A. No; other than impeding the passageway. If I had secured it on the main deck—

Q. It would have impeded the passageway?

A. That is correct.

Q. I take it from your answer that it would have made no difference as far as the safety factor is concerned, being secured one place or the other?

A. No.

Q. Is it usual or customary for a vessel to have [46] more than one accommodation ladder aboard the vessel?

A. Some ships carry only one ladder and others carry two. That is a matter of policy with the owners.

Q. Have you been aboard other vessels that have the stanchions shorter than thirty inches?

A. I think I have seen shorter stanchions.

(Deposition of Glenn E. Morgan.)

When or where I can't recall but I am almost sure that I have.

Q. Are these stanchions on an angle at all on the accommodation ladder?

A. At right angles to the sides of the ladder.

Q. If the accommodation ladder is placed in more of a horizontal position does that make the stanchions stand more upright on that type of ladder?

A. If the ladder were in a horizontal position, the stanchions would be in a vertical position.

Q. The stanchions would be in a vertical position?      A. That is right.

Q. What position would the stanchions be in if the ladder was more in a vertical position?

A. More to the vertical of the ladder and more to the horizontal of the stanchions.

Q. From your experience in sailing, Mr. Morgan, what would be your opinion with respect to whether that accommodation ladder aboard that vessel was a seaworthy accommodation ladder or [47] not; in other words, was it a seaworthy accommodation ladder?      A. Yes.

Q. I believe you testified, also, that these shorter stanchions were one factor why the accommodation ladder was not used; do you recall that or is that your testimony?

A. Will you state that again, please?

Q. That is, the fact of the accommodation ladder having shorter stanchions was one factor why



(Deposition of Glenn E. Morgan.)

that accommodation ladder was not used, was that your testimony?

A. I don't recall saying that that was a factor.

Q. Was it a factor? A. No.

Q. It wasn't necessarily a factor? A. No.

Q. What factors were involved in not using the accommodation ladder?

A. Tenderness of the ship.

Q. Did the prospective position of the accommodation ladder have anything to do with it whether being in a vertical or a horizontal position?

A. No.

Q. Then the draft of the vessel didn't have anything to do with it?

A. No. It did contribute to it. [48]

Q. It did contribute to not using the accommodation ladder? A. As near as I can recall.

Q. I don't know if I understood your answer or not, with respect to discharging the cargo. Did you complete the discharging during the day or was it during the night of April 5th?

A. During the night. The stevedores finished all cargo work and left the vessel at 2030 hours.

Q. You were also asked various questions, Mr. Morgan, as to whether a Jacob's ladder or an accommodation ladder was used at ports after you left Sasebo; do you recall that? A. Yes.

Q. The conditions with respect to tenderness of the vessel and the draft of the vessel, did they prevail at other ports?

A. Draft, but not tenderness.

(Deposition of Glenn E. Morgan.)

Q. Tenderness did not?

A. No. We did not have that situation for the remainder of the voyage.

Mr. Kennedy: I believe that is all.

#### Recross Examination

Q. (By Mr. Williams): Mr. Morgan, it is [49] unusual, is it not, that a vessel with a deep draft is tender? Let me continue the question a little more—as contrasted with a vessel with a light draft; and that is the type that is usually more tender, is it not, more so than a vessel with a deep draft, other factors being the same?

A. No; a light vessel would not be as tender. She would roll. By tenderness you mean she takes a list and holds it. A light vessel would roll but she would always come back.

Q. What you have reference to is this, Mr. Morgan: Assume that a vessel is not as heavily loaded and therefore is not as deep in the water, but the other factors pertaining to it are the same such as that it has a fairly heavy deck load and is loaded high up and has fairly empty fuel tanks and water tanks, isn't it true that a vessel with a lesser draft would be more inclined to be tender, if all of those other factors were the same?

Mr. Kennedy: I believe he has answered that question.

Mr. Williams: I don't know if he has or not.

A. I am a little confused on your question. Will you please read the question back to me again?

(Deposition of Glenn E. Morgan.)

(Last question read by the Reporter.)

A. If the other factors were the same——

Q. (By Mr. Williams): Except for the draft of the vessel?

A. Yes. It wouldn't make any difference—or it wouldn't make a great deal of difference on the draft. If you would transpose your weight, it would change your center of gravity.

Q. Your answer then is that it wouldn't make any substantial amount of difference, is that right?

A. Under the same conditions, you would still have a tendency to become tender, irrespective of the draft.

Q. Mr. Morgan, what bearing, if any, does the tenderness of the ship have upon the use or non-use of an accommodation ladder versus a Jacob's ladder, assuming that both ladders are fastened amidships, under the conditions existing in Sasebo Harbor, at the time of the accident referred to?

A. That was the first time I ever experienced that situation.

Q. Do you mean as to a tender ship in a harbor?

A. Tenderness in that degree?

Q. I may be repeating myself—but if I am I don't think you have completely answered my [51] question. What bearing would tenderness have upon the use of an accommodation ladder as distinguished from a Jacob's ladder or the advisability of using either an accommodation ladder or a Jacob's ladder under the conditions prevailing in Sasebo, Japan, at the time referred to?

(Deposition of Glenn E. Morgan.)

Q. Tenderness did not?

A. No. We did not have that situation for the remainder of the voyage.

Mr. Kennedy: I believe that is all.

### Recross Examination

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(Deposition of Glenn E. Morgan.)

Mr. Kennedy: Are you asking him for an opinion?

Mr. Williams: I am asking him for his answer to it.

Mr. Kennedy: I object to the question if you are asking for his opinion.

Mr. Williams: I am asking him for his opinion.

A. In this particular instance aboard the S.S. Augustin Daly in Sasebo, the ship being in such a tender condition, and early in the day she had changed from a port to a starboard list, it was possible that there might have been a recurrence. And we only had one accommodation ladder, which was on the starboard side. So if a launch had been alongside the vessel at the ladder and the ship had taken a list over the other way, at that time, someone might have been injured.

Q. (By Mr. Williams): How would someone [52] have been injured under those circumstances?

A. Well, perhaps someone might have been boarding or leaving the vessel.

Q. To what extent would the sudden shift of the vessel under those conditions as you have described have been dangerous to men attempting to board a Jacob's ladder,—a sudden shift of the vessel as you have spoken of?

A. In using a Jacob's or pilot ladder, you have to use both hands in order to progress either up or down.

Q. That is the difference between the two?

A. And an accommodation ladder, if everything

(Deposition of Glenn E. Morgan.)

is stable or in a neutral state, a lot of men are inclined to use only one hand on the handrails and would be more apt to be thrown off balance on an accommodation ladder.

Q. Mr. Morgan, you said that the ship shifted on some day; what day did you have reference to?

A. I was going to say on the day of our arrival, but our arrival was on the first. It was at entrance into the port.

Q. That was on the 2nd?

A. On the morning of the 2nd, she had suddenly shifted.

Q. Do you know if the reason that the ship suddenly shifted was because of something that was being done aboard the ship, at that time, or [53] whether the ship shifted of its own volition, without any influence aboard the ship?

A. I believe they were transferring oil, at that time, but I am not positive, — in an effort to straighten the ship up towards an even keel.

Q. And in so doing, it shifted over to the other side?

A. I think that was what happened; I am not absolutely certain, though.

Q. That would be a normal occurrence with a tender ship, would it not—if you try to ride a list, it would go over the other way?

A. It happens. It is not always a normal occurrence.

Q. Would you expect that this ship would take a sudden shift thereafter if something were not

(Deposition of Glenn E. Morgan.)

being done aboard it such as transferring oil from one tank to another?

A. Or discharging cargo while a ship was in that same tender condition.

Q. Mr. Morgan, with the list which the ship had, that list could have been held where it was on one side, could it not?

A. By discharging cargo evenly, you could hold a ship in any position, but on this Augustin Daly, when we arrived in Sasebo we were carrying a full deck load. It would be impossible—or it was [54] impossible to discharge anything other than the deck load because it extended over the hatches, also, and if we had had that list and tried to let go our chain lashings securing the deck load, the deck load would go over the side. So in order to start discharging, you had to take part of the list out, at least, to where you would be able to release your chain lashings.

Q. After the ship shifted, was that a shift from a port to a starboard list?

A. I would have to refer to the log to answer that.

Q. You may do so.

A. (Witness refers to log book.) There apparently is no record in the log of the vessel shifting from the twelve degree port list which we had upon arrival to a starboard list which, as I recall, was in the morning at approximately 9:25. But there is a record at 2000 hours of the ship listing from six degrees starboard to twelve degrees port.



(Deposition of Glenn E. Morgan.)

Q. On what day is that?

A. On April 2nd. That was during discharging operations,—the shift at 2000 hours.

Q. Is it your recollection that the ship shifted several times or just once?

A. Twice, that day.

Q. Twice that day?                      A. Yes. [55]

Q. Have you seen a Liberty ship do that before in harbor?                      A. Not before that incident.

Q. Do you know whether any of the tanks of the Augustin Daly were ballasted with seawater while in port?                      A. No, I do not know.

Q. You don't know whether they were or were not?                      A. I do not know.

Q. You don't know either way?                      A. No.

Q. If empty fuel tanks had been ballasted with seawater——

Mr. Kennedy: I object to that. He has already testified to the fact that he does not know whether it was ballasted or not. If you want his opinion on some hypothetical facts, I think your question should be phrased that way.

Mr. Williams: Very well.

Q. (By Mr. Williams): Mr. Morgan, assuming that there were empty fuel tanks on the Augustin Daly while in the port of Sasebo, Japan, on April 2nd, 1952, in your opinion, would the tenderness of the ship have been corrected if those empty tanks had been ballasted with seawater?

A. It would have been corrected according to

(Deposition of Glenn E. Morgan.)

[56] the amount of ballast that was taken into the tanks.

Q. If as much seawater were let in as fuel had been consumed, on the voyage over, would that have corrected the tenderness of the ship?

Mr. Kennedy: I object to that unless you assume the other conditions—the draft of the vessel and the heavy——

Q. (By Mr. Williams): We will assume all of the conditions that you stated existed, that is, the mean draft of 27 feet of the vessel and the heavy deck load; if it had been ballasted with just as much seawater as fuel that had been consumed on the way across, would that have corrected the tenderness?

A. Without a mathematical calculation I wouldn't say if it would correct it to the same degree that existed when we left Portland, Oregon.

#### Further Redirect Examination

Q. (By Mr. Kennedy): When a vessel is tender, does it have a tendency to do what I believe you or other seamen refer to as “flopping” instead of a permanent list; does it go back and forth quite rapidly?

A. Speaking of being tender, usually it means that a vessel flops from one side to the other. [57]

Q. It flops from one side to another rather than having a list for some time?

A. No; it would be true on both.

Q. You mean both conditions would exist?

(Deposition of Glenn E. Morgan.)

A. Yes.

Q. Would the fact of discharging deck cargo as you were doing in Sasebo, Japan, have any effect on the tenderness of the ship?

A. Gradually it would straighten her up, — maybe not to an exact keel, but it would reduce the tenderness and make her more stable. I might qualify that a little more, too, by saying if the discharging were equal on both sides.

Q. Were you discharging from both sides?

A. Yes.

Mr. Kennedy: Mr. Morgan, you have a right to read, correct and sign this deposition if you wish to do so or you can waive that right, without the necessity of reading and signing the deposition.

The Witness: Because of our uncertain schedule, and the difficulty of perhaps locating me at any given moment, I will waive the right to sign the deposition.

(Witness excused.)

Concluded.

\* \* \* \* \*

[Endorsed]: Filed March 10, 1955.

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RESPONDENTS' EXHIBIT No. 3

DEPOSITION OF WILLIAM J. ACCURSO

\* \* \* \* \*

WILLIAM J. ACCURSO

called as a witness by the respondent, being duly sworn by the notary public to tell the truth, the

(Deposition of William J. Accurso.)

whole truth and nothing but the truth, testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Would you state your full name, please? A. William J. Accurso.

Q. Where do you presently reside?

A. 1212 Sutter Street, Vallejo, California.

Q. What is your occupation? A. Seaman.

Q. Do you hold any particular license? [2]

A. Unlimited master's license.

Q. How long have you been going to sea, Captain? A. A little over 15 years steady.

Q. Steady?

A. Yes, a little over 15 years straight. I haven't done anything else.

Q. You haven't done anything else? How long have you held your master's papers?

A. Going on the 11th year now.

Q. How long have you actually sailed as master?

A. Approximately four or five years, five years about; four to five years.

Q. Are you working at the present time?

A. No.

Q. What are your plans for the future?

A. I figure on—I have an offer of a job possibly the end of the month, a skipper's job at the end of the month.

Q. Is there any registration procedure for catching another ship?

A. Well, I mean for master or captain the



(Deposition of William J. Accurso.)

companies have the option of hiring. Other than that, you would go through the union. I am registered down at the union also.

Q. Are your present plans to obtain another berth as soon as possible?      A. Yes.

Q. Do you expect to be in the United States within the next few months?

A. That would be hard to say. I don't think so.

Q. I take it you don't know exactly where you are going to be? [3]

A. No. I'm single and my position—tomorrow I might take a job and just leave.

Q. Now, were you master of the S.S. Augustin Daly?      A. I was at one time.

Q. When did you go aboard that vessel?

A. About the first week in January, 1952.

Q. And where was the vessel at that time?

A. I don't remember now. It was in Portland. It was in the shipyard in Portland. I don't know.

Q. In order to expedite this, I have the rough log of the S.S. Augustin Daly for the period commencing February 9, 1952, to and including April 10, 1952. I believe there is no question about the authenticity of the log.

Mr. Williams: None.

Q. (By Mr. Kennedy): I will hand you this log, Captain, and you can refresh your memory from it, if necessary.

A. This is February 9 and 10. I was on there before that. I think it was at the Portland dry-

(Deposition of William J. Accurso.)

docks, but I'm not sure right now. Anyway, it was in some shipyard.

Q. What type of articles were the crew members on? Foreign or coastwise?

A. At what time?

Q. When you took over the ship.

A. When I took over the ship it had just come from lay-up fleet, just being outfitted.

Q. And did you later sign foreign articles?

A. We did.

Q. Now, approximately when did the vessel [4] leave the United States?

A. I'd have to look at the log.

Q. Go ahead and look at the log. I have reference to any foreign port.

A. It finally sailed for the Far East on March 6th.

Q. Of 1952?            A. Yes.

Q. And what type of cargo did you have aboard, Captain?

A. As close as I recall, we had creosoted piling, timbers and bridge materials.

Q. Did you have any deck cargo, Captain?

A. We had a full deck load.

Q. What do you mean by "a full deck load"?

A. Just completely from fore to aft, all available space and up fairly high.

Q. It covered all the hatches?

A. Covered all the hatches.

Q. Did it cover part of the deck?

A. Covered the whole main deck.

(Deposition of William J. Accurso.)

A. And about how high was the cargo?

A. I'd say as far as I recollect right now it was about eight to nine feet high. You know it's kind of ragged like. I'd say around eight feet, as far as I can remember.

Q. Would it come as high as the boat deck or anywhere near it?

A. Just about, yes, just right up to the boat deck. That would be around eight and nine feet. [5]

Q. What did your deck cargo consist of?

A. That was it. Did I say the other cargo before?

Q. I don't think you broke it up. What did the deck cargo consist of?

A. Creosoted pilings, bridge material and timber, but the cargo itself in the vessel was various sizes of lumber.

Q. Were you operating under the Military Sea Transport Service?

A. Yes. The vessel was chartered by MSTs.

Q. Was that military cargo, Captain?

A. Yes.

Q. And where were you bound for?

A. At that particular time, the Far East. That is, the sailing orders were for the Far East.

Q. You didn't know exactly what port you were bound to?

A. No. We get radio diversion and orders at sea.

Q. Now, when you left Portland, Captain, what would you say with respect to whether you were heavily loaded or not?

(Deposition of William J. Accurso.)

A. We were heavily, fully loaded.

Q. Do you remember about what your draft was?

A. I'd have to look it up in the book.

Q. Well, were you anywhere near being maximum loaded? A. Yes. We were close to it.

Q. Close to being maximum loaded?

A. Yes.

Q. Now, did you encounter any difficulty on this voyage over to the Far East?

A. Yes, we had some rough weather. [6]

Q. About how far out were you when you hit the rough weather?

A. I'd have to look at the log book.

Q. I take it that you recall that you did hit rough weather? A. Yes, sir.

Q. Did you sustain any damage? A. Yes.

Q. What damage did you sustain, do you remember, generally?

A. I'd have to look at this again.

Q. Why don't you take a look at the log? Is there any list of damage that you sustained?

A. Yes.

Q. And where is that contained in the log? What entry? A. March 27.

Q. As far as you recall, Captain, is that a complete list of the damage that you sustained aboard the vessel? A. As far as I recall.

Q. For this particular date there—

A. March 22nd, itemized through the 26th or 27th. We had two or three days of bad weather.



(Deposition of William J. Accurso.)

The 23rd and 22nd we had gale force weather, heavy weather.

Q. Did you have any difficulty with your deck cargo during that time?

A. As I recall now, we did shift a little bit up forward.

Q. Some shifting?           A. Yes.

Q. Did this storm make any difference with respect to the weight of any of the deck cargo? [7]

A. Well, yes. It increased the weight of the deck load for the simple reason it got impregnated with water, waterlogged. It absorbed moisture. Of course, with a storm you always have a little rain too, so that kind of waterlogs the cargo. It doesn't have a chance to dry out.

Q. Now, did you have any further difficulty with the vessel during that voyage?

A. No. I don't know what you mean by "difficulty."

Q. Well, did anything unusual occur?

A. We started getting close to Sasebo, Japan, and we started—the ship started to get tender. That isn't any serious difficulty.

Q. And what do you mean by the ship becoming tender, Captain?

A. It has a tendency to not right itself immediately. When it starts to roll or—the action of the sea, it wants to have a tendency to go to one side or the other side off even keel. It doesn't recover itself right away.

(Deposition of William J. Accurso.)

Q. Would it remain in any permanent list from that also?

A. It could; not under all circumstances.

Q. Well, I don't know if I quite understand about this tenderness feature.

A. That is a term to explain the action of a vessel.

Q. Well, is the vessel inclined to go over suddenly? Is that one of the incidents?

A. The idea of tenderness, it will go to one side [8] and hang there. In other words, when the center of gravity meets the geographical center of the vessel, the weight itself is so close, it takes longer to right itself back or the controlling force is to pull itself back.

Q. Well, was it going from side to side like that?

A. It was upon arrival yes, in Sasebo, Japan.

Q. When did this tenderness first occur?

A. Well, we knew it was coming say half way across, but it wasn't bothering us.

Q. It was just tender in a small degree?

A. Yes.

Q. Is that your answer?

A. Yes. The vessel would still right itself. It just started to take longer and longer as we continued to use more water and fuel.

Q. Did it become any particular problem before you arrived in port?

A. No, except possibly the last day. At that time the vessel took a list, being tender, and stayed there.

(Deposition of William J. Accurso.)

I talked to the chief engineer about that. I told him to concentrate the weight on one side to more or less—in otherwise, to keep it that way; better to keep a list than flop it back and forth. By flopping back and forth, you are liable to snap the chains and the lashings over the deck load, by the sudden lurch.

Q. Then were you able to maintain a permanent list then?

A. As far as I can recall. She flopped once in a while. Through the action of the sea, she'd go [9] over once in a while. We tried to maintain her.

Q. She would flop on the other side every now and then? A. Yes.

Q. This flopping from one side to another, is that an incident of being tender?

A. That is being tender.

Q. What was the condition of the vessel when you actually arrived in Sasebo, Japan, Captain?

A. We were outside and we couldn't get in that night. We had a permanent list then. She flopped over to one side quite a bit.

Q. You can refer to the logbook, Captain, if you wish.

A. Twelve degree port list.

Q. The logbook indicates a 12 degree port list upon your arrival at Sasebo, Japan?

A. Yes, April 1.

Q. And that was what date, Captain?

A. April 1.

Q. What time did you arrive there?

(Deposition of William J. Accurso.)

A. We got there 2230, arrived outside, outer harbor.

Q. That was in the outer harbor?

A. Yes, outside of Sasebo.

Q. Then did you proceed to the inner harbor?

A. Yes. Wait a minute; yes, we proceeded in and anchored in the inner harbor. They've got here, "Anchored at 0024 in the morning of April 2nd."

Q. And that was in Sasebo, Japan, is that correct, Captain?      A. Right.

Q. And did you discharge any cargo there?

A. Yes. [10]

Q. What were you discharging in Sasebo?

A. As far as I can remember, we discharged the complete deck load and a little bit out of the hold. I forget now.

Q. Well, was the ship flopping any while you were in the harbor or was it still tender?

A. Yes. It still flopped that night. That day it flopped a couple of times. I don't see it logged in here. It flopped while they were working cargo too, discharging cargo.

Q. Can you remember about how many times it flopped?

A. I'd say, as close as I can remember, three or four times.

Q. And how big a flop was that?

A. According to the logbook here, the day of arrival here we got anywhere from 12 degrees, six to 12. In other words, six starboard to 12 maximum port.



(Deposition of William J. Accurso.)

Q. What day was that? A. April 2nd.

Q. Is that a notation of a permanent list or would you go over further?

A. That is settled in a permanent position. When she lurches, it could possibly go a little more, say as much as 15 and 20 degrees, and settle out. You see, here she is handing from 6 starboard to 12 port. Evidently it favored the port side; trying to concentrate the weight on that side, to keep it from flopping. If you concentrate more weight on one side, it has a tendency to stay there. [11]

Q. Did you have any conversation with the chief mate with respect to gangway or other means ingress and egress to the vessel while you were in port? A. Yes, the mate, he asked me——

Mr. Williams: Just a moment now. Off the record.

(Off the record discussion.)

Mr. Williams: My objection is that I object to the Captain testifying concerning any conversation between him and the mate. He may testify to what occurred, but I object to him stating what the mate's conversation was to him.

Q. (By Mr. Kennedy): Captain, let me rephrase it.

Did you have a conversation with the chief mate with respect to what form of ingress and egress would be provided for the ship?

A. Yes. He asked me——

Q. Just a minute. Your answer is yes, you did have a conversation? A. Yes.

(Deposition of William J. Accurso.)

Q. Where did this conversation take place, if you recall?

A. Either near my office or up on the bridge. I forget.

Q. Is it a normal custom for the chief mate to ask you whether a gangway or other form of ingress and egress will be provided?

A. Usual circumstances, no.

Q. What would be the usual circumstances?

A. He would just go ahead and do it. That's his job.

Q. Did he come directly to you on this occasion?

A. Yes.

Q. And did you discuss the question of what form of gangway would be put over the side?

A. Yes.

Q. What did you tell the chief mate?

A. As close as I can recall now he wanted to know if I wanted an accommodation ladder. I made it very definite that I did not. The gist of the conversation was, I told him to put out a pilot ladder instead.

Q. Is a pilot ladder the same thing as a Jacob's ladder? Are the terms used interchangeably?

A. Yes.

Q. Why did you tell him that, Captain?

A. I felt it was more safer to use a pilot ladder, or Jacob's ladder, as you call it.

Q. Why?

A. Due to the fact that we are going to discharge the deck load and the cargo, and the vessel

(Deposition of William J. Accurso.)

listing back and forth, and due to our draft and freeboard, it was in my mind, more unsafe, for safety reasons, not to use the accommodation ladder.

Q. Let me go back a little, Captain. Do you know why the ship was tender, what circumstances made it tender? A. I do.

Q. What were those circumstances?

A. Well, with the deck load plus the added weight up there and coming across the ocean, of course, we used a great amount of our fuel and water from the lower end of the vessel which [13] raised our metacenter towards the center of gravity. To make it very simple, if you go far enough you could turn the vessel over. Due to that fact, the vessel was tender.

Q. Did the heavy deck cargo have anything to do with it?

A. It did. As soon as we discharged the cargo, she would right herself. In other words, that would lower your metacenter much more below your center of gravity which has a tendency to stiffen up the vessel. In other words, the leverage on the fulcrum would tend to set itself right up, in an upright position.

Q. Now, if I understood your testimony correctly, you felt that it was safer to use a Jacob's ladder instead of an accommodation ladder because the ship was tender, is that right?

A. That is one of the reasons, yes.

Q. Are there any other reasons?

A. Well, the working of cargo, discharging of

(Deposition of William J. Accurso.)

cargo. With these long pilings, in that case, the Army wanted to float them ashore, our army, American Army. It was their job to take this cargo. It was their cargo, so consequently it was decided to float these pilings—I forget how long they were—these creosote pilings and make rafts around the vessel and float them ashore, you know, dropping them in the water or any other means and they were using barges up alongside. Due to the flopping back and forth, that was another reason why we didn't want to use this accommodation ladder. There was a possibility of flopping back and forth. [14] There was that possibility of throwing the ladder out and throwing you over with it. In most cases, most of the men including myself very seldom use two hands on the man ropes.

Q. You mean on the accommodation ladder?

A. Yes.

Q. What difference did it make that these pilings were in the water?

A. Well, when they're in the water it doesn't make any difference. The idea is of getting them from the vessel to the water. The cargo is in the air and that's where the danger is involved.

Q. With the flop, it might injure someone on the accommodation ladder?

A. It could, yes. You can't tell which way anything is going to carry. The probability was there, let's put it that way.

Q. Were there any other reasons that you used



(Deposition of William J. Accurso.)

the Jacob's ladder instead of the accommodation ladder?

A. Our freeboard available, which I don't remember at the time that we had—I should say, not available, the pilot ladder would either be too much on a horizontal or towards the horizontal and the steps would be pointing down, because the steps are rigid.

Q. Maybe you had better——

A. That is, the pilot ladder would be in two sections.

Q. Why don't you first describe the accommodation ladder?

A. This particular one, it had two sections. [15] I don't know, between 12 or 13 feet. I don't know exactly what each section was, the length, right now.

Q. In two sections?                      A. Right.

Q. And were the steps rigid?                      A. Rigid.

Q. How much freeboard did you say you had at that time?

A. I think it was around 12 feet. I'm not sure.

Q. What do you mean by freeboard?

A. The height of the main deck right to the water line.

Q. Is the accommodation ladder run from the main deck down to the water?                      A. It does.

Q. I wonder, Captain, if you could draw a diagram of what you mean by these steps being horizontal and the steps pointing in a certain way?

A. That's the ladder, we'll say (indicating). The

(Deposition of William J. Accurso.)

steps are rigid, about a 45. I assume it's just like that, with 45. You know what I mean? To get the maximum efficiency on this ladder, this type of an accommodation ladder, the vessel should be—these are built for when it is empty actually. You have got the increased freeboard. It would hang in this position (indicating). As the vessel is loaded, this keeps coming up and it points up and down. In other words, your feet are hitting the edge instead of the flat of the step. In other words, it is like the step of a house, you would be just raising one end where you would have a tendency for your leg to slip through. This is open on the bottom.

Q. Do you have space between these steps?

A. We do. [16]

Q. Now, if I understand you, using the two sections, the ladder would be in somewhat of a horizontal position? A. Yes.

Q. And that was because of your deep draft?

A. Yes.

Q. And that would result in the steps being more vertical, is that right?

A. That's right. They'd be nearly like that (indicating).

Q. The steps themselves? A. Yes.

Q. With the result that you would be walking on the top of those steps? A. That's right.

Q. Is there enough open space between the steps for someone to fall through?

A. Well, possibly a skinny guy could. They could go through.

(Deposition of William J. Accurso.)

Q. Is it possible to rig that ladder in one section?  
A. Yes.

Q. Could you have rigged it in one section in this particular case?

A. If we decided to rig it, yes.

Q. What would the result have been there?

A. In that case, the length of that one section was approximately the same as the freeboard, so consequently it would be hanging up and down and then you would have a worse situation. It would be almost straight up and down, as far as I can recollect right now.

Q. Captain, is that the type of an accommodation ladder that is used generally on Liberty [17] ships, if you know?

A. That's the type that was put out with all the Liberty ships when they originally built them, you know, the Government specifications during the war.

Q. And was that one of the reasons that you did not want to use the accommodation ladder?

A. That was one of them.

Q. Captain, this is a hypothetical question and there might be some objection. If you had a different form of accommodation ladder or more freeboard, would you have used an accommodation ladder there under the circumstances that were then existing?  
A. No.

Q. Why wouldn't you?

A. I figure it was safer the other way, using the pilot ladder.

(Deposition of William J. Accurso.)

Q. Because of the reasons that you testified to before?

A. Yes, and also this type of accommodation ladder has a short stanchion, shorter than normal and it's made well enough. The length of the stanchions are fine under the conditions where it is suitable for them. You know what I mean? Say on a lighter freeboard or less cargo on the vessel, it is enough. When the angle is increased beyond a 45, that would lay along the ship or decrease, accordingly you would have to stoop over or it is right on top of you, because the stanchions are rigid and you can't change their positions. They are in the same position all the time, so it would be unsafe from that standpoint. [18]

Q. Are those stanchions any different or are they the same that are used on that type of accommodation ladder? Are they the standard type of stanchions? A. For that ladder?

Q. For that type of ladder. A. Yes.

Q. What was the condition of this Jacob's ladder that was used, Captain?

A. Good condition.

Q. When did you get that ladder? Was it aboard when you went aboard?

A. We got it with all the rest of the stores.

Q. In Portland?

A. Yes. It was new or practically new, as far as I can remember. If it wasn't new, it was practically new.



(Deposition of William J. Accurso.)

Q. In your opinion was it in seaworthy condition?      A. Absolutely.

Q. What about the accommodation ladder? Was that in seaworthy condition?      A. Yes.

Q. Do you know where the Jacob's ladder was rigged?

A. Well, I just got through looking in the log-book and I'm sure it was on the port side. I'm not positive.

Q. On the port side?      A. Yes.

Q. Was it rigged on the main deck or elsewhere?

A. Well, it was secured on the main deck. It was secured on the boat deck right past the main deck, right down to the water.

Q. It would have to be secured right opposite the midshiphouse?      A. Yes. [19]

Q. Could you have it secured in any other place other than opposite of the midshiphouse?

A. Yes. That was the best and logical place for it.

Q. And why was that?

A. Well, that's where you would normally be coming to, the midshiphouse, and it would be safer because it would be out of the way of the hatches.

Q. And the cargo?

A. And the cargo. On every ship it's always near the midshiphouse or the quarters, you know, where you would have your form of going to and from shore, either by gangway or ladder or whatever you used.

(Deposition of William J. Accurso.)

Q. Do you know what it was secured to to the boat deck?

A. Well, as far as I can recollect it was secured to the railing. That's where they're always secured, most cases, on any ship.

Q. Do you know why it was secured on the boat deck, Captain? What I am interested in, I was wondering if it made any difference whether it was secured on the main deck or on the boat deck.

A. Well, the ladder there would be more than you need. It would be one piece, of course, and it would be laying down on the main deck and also whoever would be coming aboard, is just as easy to get off the main deck or the next deck up—it's eight or nine feet. It's just as easy to take two more steps up and get off on the boat deck. For myself, that is what I always used to do.

Q. If it was secured on the main deck, would [20] it have cluttered up the passageway anyway?

A. It would, yes.

Q. Because of its length? A. Yes.

Q. What people, in general, were coming aboard the vessel during the stay in Sasebo?

A. The officers and crew, ship's agents, stevedores, port officials, Army and Navy officers.

Q. Do you have any idea of the average number of people who would be coming aboard and leaving every day?

A. I assume that the stevedores used it plus ship chandlers too. I'd say it could be possibly used by 100 men a day.

(Deposition of William J. Accurso.)

Q. Now, did you keep this Jacob's ladder there all the time that you were in Sasebo?

A. As far as I recall, yes.

Q. You didn't put out the accommodation ladder?

A. No.

Q. Was everybody using this Jacob's ladder to come on board and to leave?

A. As far as I know, yes, unless the stevedores rigged something themselves, which I'm sure they didn't. I'm not sure they didn't.

Q. As far as you know, there wasn't any other means rigged?

A. No.

Q. Now, when was the crew given shore leave, Captain?

A. In this case, in this particular case, they were unrestricted as to shore leave as long as they didn't have duties to perform. [21]

Q. Like standing regular watches?

A. Yes. When they were off watch, they were free to go anytime they wanted.

Q. How would they get to and from shore?

A. By launch, power boat, motor boat.

Q. And by whom was the launch provided?

A. There was a regular launch service for the crew set up four or five times a day and besides that there are various other launches coming for ship's business that the crew could go ashore with them anytime they showed up. They could bum a ride with them.

Q. Did they have to come back at any certain time?

A. No.

(Deposition of William J. Accurso.)

Q. Was there any curfew there in Japan?

A. As far as I can recollect, on the curfew, you're supposed to be off the streets between 12:00 and 6:00. There's nothing stopping anybody from staying ashore.

Q. Could they stay ashore as long as they wanted?

A. As long as they were off the streets between 12:00 and 6:00.

Q. As far as you're concerned—as far as you were concerned, as long as they stood their watches and did their regular work, could they stay ashore as long as they wanted to?      A. Absolutely.

Q. Did you have a launch running to the vessel in the morning?      A. Yes. [22]

Q. About what time would that return?

A. I don't remember the exact time, but it usually figures around breakfast time. The change of the watch is around 8:00 o'clock. In Sasebo it probably would be coming back around 7:00 in the morning, leave the shore at 7:00 in the morning and possibly leaving the ship at 8:00 in the morning, changing of the watch for anybody going, it would be around 8:00 in the morning.

Q. Was that your first port, Captain?

A. After leaving Portland, the first foreign port.

Q. The first port from Portland?

A. First foreign port from Portland.

Q. Did you make any ports in the United States before leaving on this foreign voyage?

A. Yes, Coos Bay, if I recall.



(Deposition of William J. Accurso.)

Q. From there where did you go?

A. Back to Portland.

Q. And then from Portland to Sasebo?

A. Yes.

Q. Did you go up and down this Jacob's ladder, Captain?

A. Yes.

Q. Did you have any difficulty?

A. No.

Q. Had you ever been in Sasebo harbor before this particular time?

A. I wasn't at anchor there, no.

Q. Have you been in the Orient many times previous to this?

A. Well, I don't know what you would call many. I have been there before. [23]

Q. Do you know about how many times? What I am getting at, I was wondering if you were familiar with any general practice in the ports in the Orient?

A. Yes. I am familiar with them.

Q. Is there any practice with respect to the use of an accommodation ladder or Jacob's ladder?

A. Well, if you are only in for a short time, usually it's a Jacob's ladder and when the weather is bad you always use a Jacob's ladder, because the accommodation ladder is more dangerous. The shore boats have such a hard time maneuvering. These Japanese launches—we don't have our own shore boat on the vessel. I'd say at anchor you'd use the pilot ladder just as much as the accommodation ladder, if not more.

Q. In ports in the Orient?

(Deposition of William J. Accurso.)

A. Yes. One of your main obstructions of using the accommodation ladder is the barges alongside when you're working cargo on both sides of the vessel. There's always a shifting back and forth of them. It invariably happens, due to your change of draft, unless you got a man on continuous watch—then you slip up once in a while—the barge will rap it or the tow boat and then you haven't got anything. In most cases the ships—very few carry two of them, at least the ones I have been on.

Q. Do you know, Captain, what lights were provided, if any, near this Jacob's ladder?

A. Not offhand I can't recall, but I'm sure there was sufficient lighting. [24]

Mr. Williams: I object to that. I think the answer of the witness should be stricken as not responsive to the question and not constituting an element of fact, but a conclusion based on no facts.

Q. (By Mr. Kennedy): What lights were available near where this Jacob's ladder was rigged, Captain?

A. The lights around, outside the midshiphouse and along the passageways, a light from the—I'm thinking of another ship. Anyway, them lights would be there and you always rig whatever you consider is necessary as far as cargo lights are concerned. They are anywhere from three to five hundred watt lights.

Q. Do you know whether or not a cargo light was rigged?

A. I'm sure there was one rigged.

(Deposition of William J. Accurso.)

Q. Do you know, yourself? A. Yes.

Q. Did you see it there? A. Yes.

Q. About how large a bulb would that be?

A. I don't remember whether—some have five in there, five 100-watt bulbs or clusters. Some of these mobile bases, either 300-watt or 500, so I'd say it would be a minimum of 300 watts of lighting and a maximum of five. This is the usual cargo light. That particular one, I do not remember.

Q. Do you remember an accident that happened to John Farley aboard the vessel?

A. I remember that I was told about it. I was not there at the time. [25]

Q. Were you aboard the vessel at that time?

A. No.

Q. What was John Farley aboard the vessel?

A. Second assistant engineer.

Q. Do you know who was in the launch at the time of the accident, Captain?

A. Not except from the reports that were made. That's the only ones that I know.

Q. Do you know if the first mate was aboard the vessel?

Mr. Williams: He has already answered the question.

Mr. Kennedy: I will agree. Let me change the question.

Q. Do you know who was aboard the vessel and who wasn't aboard the vessel at the time of the injury? A. No, I don't know.

Q. You don't know for sure yourself?

(Deposition of William J. Accurso.)

A. No.

Q. When did you leave Sasebo, Captain? You can refer to the log.

A. Same day of the accident, I know that. April 6.

Q. What time on April 6?

A. I've got 11:30 here in the logbook.

Q. How long would it take the launch to go from the dock to the ship, Captain, approximately?

A. That varies with the current and the individual operator of the launch. They always got a little reserve speed. It averaged around 40 or 45 minutes.

Q. Could you tell exactly when it would be returning to the ship?      A. No. [26]

Q. I wonder if you could describe briefly this particular launch.

A. I can't because I don't remember.

Q. Would you have any idea of the length?

A. No, because the launch service was a little company there and they had three or four different launches and I don't even know if they are the same. Most cases they average around 35 or 40 feet, I guess, around 40 feet. That would be my guess.

Mr. Kennedy: I believe that is all.

#### Cross Examination

Q. (By Mr. Williams): Captain, you said, I believe, that you have held master's papers for



(Deposition of William J. Accurso.)

approximately 11 years and you have sailed as a master for about four or five?      A. Yes.

Q. Was the S.S. Augustin Daly the first Liberty ship that you had taken out at that date?

A. No.

Q. How many had you taken out prior to that, if you know?      A. Four others.

Q. Four other Liberty ships before February of 1952?

A. Yes, four actually made ocean voyages, four or five. I have been on numerous ones, just around the Bay Area here, getting them ready for sea when the companies take over.

Q. Did you start sailing as a master in the year 1950?      A. No. [27]

Q. You said you had sailed as a master for about four or five years.

A. Intermittently. I have sailed mate in between. I first started sailing master in 1944, as young as I am.

Q. What is your age now?

A. Thirty-three.

Q. And do you still sail now only as master or sometimes as mate?

A. I have sailed chief mate and master, depending on the money involved, providing I get the job.

Q. Captain, when you left Portland I believe you stated that was on March 6th, on the Augustin Daly bound for the Orient?

A. According to the logbook, yes. I can't remember all these dates and times now.

(Deposition of William J. Accurso.)

Q. I believe that is the date you stated you took from the logbook.

Mr. Kennedy: It's in the logbook.

Q. (By Mr. Williams): You said your ship was fairly heavily loaded then? A. Yes.

Q. Were you well loaded with fuel at that time?

A. What do you mean by that?

Q. Were you fully loaded with fuel?

A. No.

Q. Were all your double bottoms filled with fuel oil? A. No.

Q. How many barrels of fuel oil did you have on there?

A. I'd have to look at the log. [28]

Q. You might as well look at it.

A. It says 6,830 barrels of fuel upon departure.

Q. And was that on March 6th?

A. That's right.

Q. And this voyage was to take about how many days, Captain? What was it anticipated it would take?

A. You mean that particular leg of the voyage?

Q. Yes, from Portland to the Orient.

A. Well, I didn't know where we were going. You get your orders two or three weeks hence, we'll say, so I was figuring between 30 and 35 days. I didn't know.

Q. Did you have enough fuel for 30 or 35 days?

A. Yes.

Q. You said you had a fairly heavy deck cargo? Was that your testimony, Captain? A. Right.

(Deposition of William J. Accurso.)

Q. And that consisted mostly of bridge materials, timbers and creosote pilings? A. Yes.

Q. That was primarily the deck load?

A. Yes, as far as I remember.

Q. What are the bridge materials made of?

A. Heavy timber.

Q. Creosoted?

A. No. It's one of these for the Army Engineers, you know. It's kind of prefabricated. All you did was throw it together, like trestle stuff and supports.

Q. What do you think most of the cargo was that was on the deck, the majority?

A. It was all lumber or timber of some sort.

Q. Would you say that it was mostly bridge materials or mostly creosote pilings or mostly——

A. Gee, I don't remember that.

Q. Now, you have stated I believe that you had some bad weather around the 22nd to the 27th of March? A. Yes.

Q. Is that the type of weather you would normally anticipate at that time of year? A. Yes.

Q. You were taking seas on your main deck, is that what you are indicating?

A. Yes, a little. I don't remember how much.

Q. Is that where this water came from you were referring to? A. That and rain, spray.

Q. Most of the water that gets on the main deck, does it run off the sides through the scupper?

A. Yes.

Q. It would only be the absorption of the mate-

(Deposition of William J. Accurso.)

rial itself you referred to that would add to the weight?      A. Yes.

Q. Creosote piles, do they absorb much water, Captain?      A. Yes, they absorb it.

Q. You think they absorb a lot?

A. I don't know.

Q. Do you know how much heavier your deck load became as a result of the water?      A. No.

Q. It is true, is it not, Captain, that it would amount to a fairly minimal amount increased weight?      A. I wouldn't say that.

Q. You think it is a considerable amount?

A. Yes. [30]

Q. What would you estimate, Captain? What additional weight would you estimate from that water? It would just be an absorption of water into the timber you're speaking of?

A. Yes. Here is the thing there that I have to explain to you. Some of that was——

Q. I would prefer if you would answer.

Mr. Kennedy: Let him answer the question.

Mr. Williams: I want him to answer the question first and then explain later. You can answer and then offer your explanation.

The Witness: You want me to state how much?

Q. (By Mr. Williams): If you are able to do so. If you can't estimate, say so.

A. I'd say between 50 to 100 ton, in my estimation.

Q. Did you want to offer an explanation, Captain?      A. Yes.



(Deposition of William J. Accurso.)

Q. Please do so.

A. This cargo was loaded in the rain. It was wet to start with or it had been laying out on the docks and there was snow on it, this bridge material and some of the other stuff, as far as I can remember, timber and everything else and pilings too. When you load that compactly, the sun can't get to it and it absorbs that weight there in a period of a couple of weeks and it will absorb it, plus the seas, plus the rainwater and everything else. I'd say at least 50 to a hundred ton. [31]

Q. In the 50 to a hundred tons, Captain, you mean increased weight by reason of the fact that these materials were heavier before they were even put on the ship itself? They were laying on the dock?

A. Plus the fact too of the rain and——

Q. Are you estimating 50 to a hundred tons of water was absorbed by these materials just on the voyage across or prior to that?

A. Just on the voyage across.

Mr. Kennedy: I'm going to object to this. You're arguing with the witness.

Mr. Williams: I merely want his estimate.

Mr. Kennedy: He testified to it. You go ahead and ask him questions. You're arguing with him now.

Mr. Williams: I think not, counsel. I am only going to ask questions to attempt to clarify it.

Q. Is it your testimony then Captain that the seas and the weather on the way across added 50

(Deposition of William J. Accurso.)

to a hundred tons of additional weight to the deck cargo? Is that your testimony? I just want to be sure what it is. A. I'd say around 50.

Q. Around 50? Not 50 to a hundred, but around 50? A. Yes.

Q. Captain, you stated, I believe, that about half way across on your voyage the ship started to get tender, is that correct?

A. Well, we could notice it.

Q. Notice tenderness develop, is that it? [32]

A. That's it.

Q. And you stated that that was no serious difficulty? A. No.

Q. When did it become a serious difficulty?

A. It never did become what I consider a serious difficulty. It became very apparent the day before we arrived, let's put it that way. She started flopping back and forth, but before she was just listing and a slow recovery.

Q. The action of the seas would make it list?

A. Not the action of the sea. It would be rolling.

Q. But you mean it would take more exaggerated rolls?

A. The ship is—it is the sea that forces the ship to roll. A list is when the ship itself develops a cant to one side or the other.

Q. Captain, is it customary to have a tender ship? Is that normal sailing procedure?

A. No.

Q. Is that unusual? A. No.

Q. It is not unusual?

(Deposition of William J. Accurso.)

A. No, not with lumber cargo, absolutely not.

Q. Is it normal to keep a slight port list on a ship when she's under way? Is that normal?

A. No.

Q. You would say it is normal to keep a ship on an even keel?      A. Yes.

Q. Captain, what would be the weight of this ship with its cargo on at the time it left Portland?

A. I wouldn't know. [33]

Q. You have no idea?

A. I would have to figure it all out.

Q. Can you tell from the log?      A. No.

Q. Can you tell the amount of cargo weight from the log?

A. Well, sometimes you can and sometimes you can't. I don't know whether they put the weight in here or not. I can't find it in here.

Q. Captain, who determines how much fuel should be taken aboard a ship when it leaves and who determined it in this case?

A. In this case MSTS determined it.

Q. The amount of fuel?      A. Absolutely.

Q. You did not?

A. No. In this particular case the charterer, MSTS, is the one to decide how much fuel you are to carry.

Q. Do you mean your employers?

A. No, MSTS.

Mr. Kennedy: That is calling for a legal conclusion. I will object to that.

(Deposition of William J. Accurso.)

Mr. Williams: I will withdraw the question. I don't want to get into that anyway.

Q. Did you state Captain that the double bottoms were not fully loaded with fuel oil?

A. As far as I can recollect, yes.

Q. There were several empty double bottom compartments into which fuel oil could have been placed?

A. I don't know how many, but there could [34] have been a few placed. It wasn't up to me.

Q. Is that the reason this ship became tender on the way across? Is one of the reasons because it didn't have enough fuel oil to start with?

A. No, we had enough fuel oil to start with.

Q. Captain, do you try to plan a voyage so that the ship will never become tender at any time?

A. You can calculate that.

Q. You calculate it so that it will become tender?

A. No. I say you can. In fact, it's quite often done. This has nothing to do with the voyage we are talking about, but for your intercoastal ships, take ships taking lumber to the east coast, they get down to their load-line. You can't load any further. You say that you're full and down, maximum load. They will leave port and come down to Los Angeles here and by the time they get down here to Los Angeles, they're tender. They know they are going to be tender, but it's not unseaworthiness.

Q. Is the ship difficult to handle when it is tender, Captain?



(Deposition of William J. Accurso.)

A. Well, it's not difficult, but you can notice it. It affects your steering, but it isn't difficult. Just affects your steering a little bit.

Q. What methods are available, Captain, to correct tenderness on the ship while she's on the voyage? A. At sea, in other words? [35]

Q. Yes, at sea.

A. Fill your double bottoms.

Q. With sea water?

A. Well, that is available, yes.

Q. Well, that would be ballasting? A. Yes.

Q. And would you normally ballast with sea water the empty double bottom compartments in which there was no fuel? Is that the way it would be done?

A. If there was no possibility of having fuel in there, yes.

Q. Captain, what do you refer to if there is no possibility of having fuel in there? What do you mean by that?

A. They are all available except one of them tanks—your double bottoms, on a steamer, is usually feed water for your boiler. That's got to be fresh water. That's understood. They are all fuel tanks. We are assuming part of them are empty and that you are going to put fuel in, but you never want to put salt water unless you absolutely have to where you're going to contaminate the fuel oil, which consequently doesn't do your boilers any good either.

Q. Captain, can you tell me of your own knowl-

(Deposition of William J. Accurso.)

edge, did you give any orders to ballast this ship on the way across when she started to become tender?        A. I did not.

Q. Did you in port, in Sasebo?

A. To ballast them?

Q. Yes, to ballast with sea water?        A. No.

Q. Why not?

A. Because we were going to discharge the deck load and it would ultimately correct itself.

Q. If you had taken some sea water aboard as [36] ballast on the way across you would not have been tender when you arrived in Sasebo, would you?

A. That's correct. I want to qualify that statement. When you take salt water ballast—I didn't know until I got in there—we were under a radio curtailment. We couldn't open up unless I considered it important. That was Navy orders. When you put ballast in the fuel oil tanks, you contaminate—the oil mixes with the water a little bit. I was under the assumption I was going to get more fuel oil in Sasebo, which ultimately I did not. Consequently, you have to dump that ballast at sea, because you can't contaminate coastal or water in the harbor. Even if I had ballasted, I would have probably dumped it out before I got in with the assumption I was going to take fuel oil on, but I didn't know until the Army and Navy decided they wouldn't give me any.

Q. Captain, I believe you said that on the last

(Deposition of William J. Accurso.)

day, that would be on the day of April 1, wouldn't it, before your arrival——

A. Around midnight, April 1.

Q. On that day, the tenderness became quite acute?

A. Yes.

Q. Did the ship flop that day?

A. Yes.

Q. What was that due to? The roll of the sea? Would the roll of the sea cause it to go one way?

A. Would the roll of the sea—with these other factors it would cause it to flop. In other words, your tank was slack. The movement of the sea moves the vessel and with your slack tanks and [37] with the ultimate result that the fuel oil or whatever it is, plus all the other actions, you know, it would make the ship flop rather than a slow easy roll. It would just make it flop.

Q. Captain, as a full compartment and double bottom, as that supply is consumed, is it normal practice to consume it entirely in one section before you start on another or do you consume it equally from all of them so you have all your tanks slack?

A. No. You keep your tanks pressed up, in other words full. In other words, normal procedure, they use one tank at a time.

Q. Do you know if the ship had several slack tanks shortly before you arrived at Sasebo and upon your arrival at Sasebo?

A. Right now, I don't remember but we probably did.

Q. Did you consult with the chief engineer on

(Deposition of William J. Accurso.)

that matter?           A. Yes.

Q. What was his name, do you remember?

Mr. Kennedy: You have got it in the logbook, I think.

The Witness: Fred Grull.

Q. (By Mr. Williams): Did you order him to do anything with regard to those tanks?

A. Well, as far as I can recall, I told him to keep them pressed up. I didn't want to ballast them either.

Q. You didn't want to ballast them with sea water? [38]           A. That's right.

Q. Didn't Mr. Grull?

A. Absolutely not. That's against all engineers.

Q. It's against all engineering principles to ballast with sea water?

A. Yes, unless it's absolutely required for the seaworthiness of the vessel. Here's what they don't want. The engineers don't want to contaminate their fuel oil. In time, when they do use it, and with that part of the water in the oil, it fouls up their boilers and condensers or anything else. I am not an engineer. They don't want to do it. They don't like to do it. Of course, if they are ordered, they have to do it.

Q. Nonetheless, it is quite commonly done, is it not, ballasting with sea water?

A. Not in the fuel tanks, no, sir.

Q. Where do you ballast with sea water?

A. Usually, you can, on some ships you have just tanks especially for ballasting.



(Deposition of William J. Accurso.)

Q. Do you have them on a Liberty?

A. Not actually for ballasting. It all depends on what you would want to call it. There is deep tanks in the vessel. Sometimes they are hooked up for fuel too. In this particular case I don't remember whether it was hooked up for fuel or for ballast or for fresh water. I do not know.

Q. Captain, you have stated I believe that there [39] were tanks, double bottom compartments with fuel oil when you left Portland.

A. Yes.

Q. Could sea water be ballasted in those tanks?

A. If I deemed it necessary.

Q. And you didn't think it was?

A. No. There was danger of the ship turning turtle. That is the only time I would consider it.

Q. When you arrived in Sasebo Harbor itself, you started discharging deck cargo immediately?

A. I don't remember if it was immediately.

Q. You said the ship flopped three or four times. Was that in Sasebo in the harbor?

A. Yes.

Q. Did it all occur the same day?

A. Yes.

Q. Would that be the first day you were in Sasebo?

A. Yes.

Q. That would be April 2nd?

A. Yes.

Q. I believe the ship arrived at midnight, Captain?

A. Yes, the 2nd.

Q. What was that flopping due to?

A. The ship being tender.

Q. Captain, there was no roll of the sea to precipitate the ship from one side to the other when

(Deposition of William J. Accurso.)

you were in this harbor?           A. No.

Q. It was smooth water?           A. Right.

Q. What caused it to move from one side to the other?

A. It was probably the weight that was moved, [40] you know, when we were starting to discharge the cargo.

Q. Do you have charge of the discharging cargo to the extent that you can order where it can be taken from first?           A. Yes.

Q. What is your normal practice with regard to that? Do you try to see it is discharged evenly from the deck?           A. Well——

Q. Insofar as possible.

A. Under certain circumstances, yes.

Q. Did you in this particular case?

A. In this case I discussed with the mate. Normally I'd leave it up to the chief mate. In this case I did.

Q. Did you attempt to see that that was done, it was taken off evenly?

A. I attempted to try to get them to concentrate on one side.

Q. Was that on the port side?

A. I don't remember now. I don't remember, but to try to get the weight off opposite to the way she was listing so it would increase the tendency to maintain that—so she won't flop back. Then once you get below a point where you knew she wouldn't flop any more, you would keep taking it off evenly.

Q. If I understand you correctly, Captain, your

(Deposition of William J. Accurso.)

idea in unloading would be to attempt to unload in such a way as to hold the existing list?

A. Yes.

Q. And then when it got to a point where you would determine it would not flop, then to discharge it evenly? [41]

A. Yes, or whatever would be easier for the stevedores or everybody concerned.

Q. Captain, about how long does it take to set up a Jacob's ladder or a pilot ladder?

A. Five to 10 minutes, depending on where it is stowed and where it is——

Q. Do you recall this particular Jacob's ladder that you referred to? Do you recall what it looked like?

A. Yes.

Q. Did you order your chief mate to affix it to the boat deck or to the main deck or did you leave that to the mate's discretion?

A. To his discretion.

Q. And it was fixed to the permanent pipe rail on the boat deck, was it not?

A. Well, as far as I can recall.

Q. That would be about amidships on the ship?

A. Yes.

Q. And are the sides of the ship fairly straight, as far as up and down? Are they relatively vertical at that point?

A. Yes.

Q. Would the Jacob's ladder hang down in such a manner as to touch the edge of the main deck also when it was secured to the boat deck or would it be out from it a little bit?

(Deposition of William J. Accurso.)

A. I don't remember now, but I think they had it secured to the main deck too. They take a turn on that too.

Q. You don't recall that now? A. No.

Q. Of course it is not secured at the bottom?

A. No.

Q. By the 5th, the majority of the cargo had [42] been discharged then, had it not?

A. According to the logbook, the deck load was pretty completely discharged by the 5th, that night of the 5th.

Q. The ship was no longer tender at that time?

A. No, sir.

Q. Then these considerations with regard to the use of accommodation ladder or Jacob's ladder, as far as the tenderness of the ship, did not prevail on the 5th? A. Say that again.

Q. The conditions concerning the feasibility of using the accommodation ladder or the Jacob's ladder that you previously referred to, as far as the tenderness of the ship was concerned, that did not prevail on the 5th of April? A. No.

Q. Because the ship was no longer tender?

A. That's right. It did prevail as far as cargo working was concerned.

Q. How much would you say the ship came out of the water as her cargo was unloaded, how many feet? Would you know?

A. For 1,200 ton of cargo, that was the deck load—50 ton to an inch, approximately. The cargo taken off, it would be around two feet. Then we



(Deposition of William J. Accurso.)

no doubt took fresh water there which increased the weight back again, so I'd say a maximum change of arrive and departure wouldn't be more than a couple of feet. I could look it up in the logbook.

Q. If you can find it, Captain.

A. That would be [43] the departure date, wouldn't it? Here you are. We arrived on April 1 with a mean draft of 25 feet and we sailed with a mean draft of 23.03, so that's about a foot and nine inches. It's less than two feet change even with 1,200 or more ton of cargo discharged. We took a few hundred tons of fresh water.

Q. Did you determine, Captain, that you should put out a pilot ladder instead of a Jacob's ladder—pilot ladder instead of an accommodation ladder?

A. Yes. That was my decision, yes.

Q. And I believe the reason you stated for that is the ship was tender and—

A. Mainly for safety reasons.

Q. For safety reasons. You felt that it was a matter of safety?

A. In other words, I assumed it was safer to use that pilot ladder than the accommodation ladder under the extenuating circumstances at the time.

Q. That was the sole reason, one of safety, is that right? A. Primary reason.

Q. And do you know on this Jacob's ladder, do you recall the length of the stanchions on it?

A. The Jacob's ladder, you said?

Q. I mean the accommodation ladder.

A. They are normally short, around two feet.

(Deposition of William J. Accurso.)

Q. Twenty-four inches?

A. Approximately. I don't recall.

Q. That is shorter than they are on other type ships, is [44] that your testimony?

A. Yes, I'd say so.

Q. Had you ever seen an accommodation ladder with stanchions this short before? A. Yes.

Q. Was that a factor bearing on your decision not to use the accommodation ladder?

A. That was one of them. There was a lot of little ones; on account of the angle involved——

Q. Do you know if this accommodation ladder had one handrail or two, if you know?

A. I think it had two.

Q. But do you know?

A. I don't know. I'm sure it had two. They are always rigged for two.

Q. Do you know if it had two fitted onto it?

A. I'm pretty sure it did.

Q. Do you know how long each section of that accommodation ladder would be, the two sections, each one?

A. I'd venture to say, a guess, it would be around 11 or 12 feet a piece.

Q. Do you think your guess is pretty close to accurate on that, or do you know? Do you think you are within one foot or five feet on your estimate? A. Within a foot or so.

Q. The total ladder, when it is hooked up would be 22 to 24 feet? A. About that.

Q. And that ladder, you say, would not provide

(Deposition of William J. Accurso.)

a good angle down to the water for people to use?

A. Under these conditions?

Q. Under these conditions. A. No. [45]

Q. I don't mean to interrupt you. I believe you stated you had about 12 feet of freeboard?

A. Yes.

Q. That increased as you unloaded the ship?

A. A foot and 10 inches, or whatever it was.

Q. Do you feel that that afforded a poor angle? What would you say would be the best distance to use the accommodation ladder correctly?

A. On a Liberty ship, on this type of ship and this particular type of gangway?

Q. Yes. What is the maximum effective freeboard distance to use this type of an accommodation ladder? A. Well, the angle that that—

Q. How many feet of freeboard should you have which you might consider to be perfect or very nearly so?

Mr. Kennedy: If he knows.

Q. (By Mr. Williams): If you know.

A. Right now I don't know.

Q. To make the steps level, in other words. That's the question. A. I don't know.

Q. You don't have any idea? A. No.

Q. Did you state that the accommodation ladders are figured to be used only for empty ships? That is what they are built for?

A. That is near that empty stage is where they have the best angle for the steps.

Q. I believe, Captain, you stated that you would

(Deposition of William J. Accurso.)

not use this particular accommodation ladder under any circumstances at [46] this time for some reason. Why was that?

Mr. Kennedy: Just a moment.

Mr. Williams: If he didn't so testify——

Mr. Kennedy: Excuse me. Off the record.

(Off the record discussion.)

(Record read.)

The Witness: Safety reasons. I figure it was safer to use a Jacob's ladder under these conditions.

Q. (By Mr. Williams): Well, is it your testimony that even if the ship had not been tender you would have used the Jacob's ladder or the pilot ladder rather than the accommodation ladder, is that a correct statement?

A. It's hindsight now, much better than foresight. The way we were going to discharge that cargo, I'd say it was just as safe to use a Jacob's ladder.

Q. If the draft of the vessel was different, would that have altered your decision? If there was a greater amount of freeboard under the conditions prevailing——

A. I—we still had to discharge that deck load into the water and then the barges was up and down. I don't know. It may and it may not.

Q. Do you know how long you were going to be there when you arrived?

A. I don't remember now, because I don't remember whether they said I was going to load or discharge or what.



(Deposition of William J. Accurso.)

Q. Did you know you were going to be there at least three [47] or four days?

A. Well, somebody must have—I could have estimated or found out from the stevedores, two or three days, whatever it was. I don't remember now.

Q. Now, Captain, did you observe people using this pilot ladder at that time and place?

A. Yes. I even used it myself half a dozen times.

Q. You said that you went up on the boat deck to get on and get off the ladder? A. Yes.

Q. Is that what most of the crew did?

A. Most of the crew they got off on the main deck. That's where they lived or stayed in their rooms. I had to go up two more decks. It was just as easy for me to go up that way.

Q. Captain, isn't it a fact it would be more difficult to get off that Jacob's ladder at the main deck than it would at the boat deck?

A. I don't know.

Q. Your answer is you don't know?

A. It would probably be a little more exercise involved, yes.

Q. Is it not correct, Captain, that you have to step around the edge of the ladder? The ladder would continue on up and you would have to step around the side of it to get over the gunwale and onto the main deck? A. Yes.

Q. Whereas up on the boat deck, it would only be necessary—the ladder stopped there and you would go just right up and over the top of it?

(Deposition of William J. Accurso.)

A. Yes. If it didn't stop, [48] it would go over the rail and down to the deck.

Q. It didn't continue on up? A. No.

Q. You said, I believe, that you had just one accommodation ladder on board?

A. As far as I recall, yes.

Q. Are you certain whether or not you had one or two or is that just your best estimate or are you certain?

A. As far as I recall, we only had one.

Q. Do you know why ships carry two?

A. Well, if you're moving, you know, and a port like—time is of the essence, especially when you got stevedores waiting. Most companies that own ships, they will have two, just for the time involved and the money saved and especially going to the dock. That way you don't have to keep interchanging. One dock you might be on the port side and the other dock you are moving to an hour later might be on the starboard side.

Q. Do you know where the accommodation ladder was kept aboard this vessel, Captain, at the time? A. I don't remember now.

Q. Do you know if there is a platform to which it can be fastened? A. Yes.

Q. Do you know if it was right there or someplace else? A. I don't remember that.

Q. About how long would it take you to hook up an accommodation ladder, rig it for use? [49]

A. That would all depend on the circumstances;

(Deposition of William J. Accurso.)

if the cargo gear was down: which side it was; which side you wanted to rig it on.

Q. You would have rigged it on the same side you would have rigged the Jacob's ladder on, would you not?

A. Maybe. That I can't tell you're at an angle, it doesn't matter which side you rig your accommodation ladder. You must have a reason: whether you are going to work cargo on one side—it's hard to say right now. It depends on the circumstances.

Q. Well, do you know about what period of time it would ordinarily take to rig that up?

Mr. Kennedy: Excuse me. I think he has answered that. If there are various illustrations you want to give, that is all right. I believe he has answered the question. He said it depends on the circumstances. It depends on which side they want to rig it. It depends on this and it depends on that.

The Witness: Do you want me to answer that?

Mr. Kennedy: If you can, go ahead and answer it.

The Witness: We are assuming now there is only one ladder on a ship, accommodation ladder we are speaking about. If everything is handy there, the railings and everything, swung in in the recess of the vessel, you might have a gear box—it's just a matter of flopping that out and hooking your falls up. There's a lot of little things that come in [50] there. Assuming that everything is under the best conditions, you can rig that in 15 or 20 minutes and have it lowered. Assuming you're going to have to move it over to the other side, your cargo booms

(Deposition of William J. Accurso.)

are there. That's the only means you have to move stuff around on merchant ships. You have to rig one side, disconnect and pick it up and bring it around the hatch. You're using No. 3 gear and 4 gear. Your midshiphouse is in between. You can't rest it on the dock. It could be as much as two hours, two and a half hours and you can rig it as quick as 20 minutes maybe. That would be an exceptional crew.

Q. (By Mr. Williams): Does the time factor of the rigging have a bearing on your decision?

A. No, sir.

Q. Had it in other cases?

Mr. Kennedy: I think we are getting way afield.

The Witness: You could still throw a pilot ladder over if the guys wanted to go or come up. You do it for the port officials.

Q. (By Mr. Williams): Do you know the exact length of the pilot ladder that was used?

A. No, I don't.

Q. Captain, you gave some testimony concerning the use of a pilot ladder and an accommodation ladder in the Orient. Now, is there any different factors elsewhere or is that peculiar to the Orient that you referred to?

A. In the Orient there's an awful lot of laying at anchor that you ordinarily don't do in other trades, like in [51] Europe. You seldom lay at anchor in Europe. Proportionately, we'll say, in this country merchant ships—well, right here in the harbor, did you ever see any ship laying at anchor



(Deposition of William J. Accurso.)

20 minutes or so—just to pass quarantine. Very seldom.

Q. Did you have a conversation with Malcom E. Potts following the injury to Mr. Farley?

A. I don't recall. I might have asked him what had happened. I don't recall.

Q. You don't recall whether you had a conversation or you don't recall what the conversation was?

A. I don't recall having a conversation.

Q. Did you ask him to sign a statement or fill out some sort of a report with regard to that accident?

A. I may have, yes, but I don't recall it now.

Q. Well, I will ask you whether or not he told you why he happened to fall.

Mr. Kennedy: Off the record.

(Off the record discussion.)

Mr. Kennedy: I will object to that on the ground it is hearsay.

Mr. Williams: I want to ask him the question anyway. The court will rule on it later.

The Witness: I don't remember whether he did or didn't or whether I asked him or not.

Q. (By Mr. Williams): The Malcolm E. Potts that I have reference, do you know who I mean?

A. Yes. [52]

Q. Who was he and what relationship did he sustain to the S. S. Augustin Daly?

A. He was assistant cook at the time.

Q. Had you been to sea with this man before?

A. No.

(Deposition of William J. Accurso.)

Q. Do you know if this man had ever been to sea before? A. No, I don't.

Q. Captain, when the Jacob's ladder was rigged to provide ingress and egress for members of the crew, did you give the crew any instructions as to how the ladder should be used, any instructions as to the method to employ in going up and down the ladder?

A. You mean me personally or through the mate?

Q. Did you personally? A. No.

Q. Did you instruct the mate to give some instructions like that?

A. Well, specifically, I don't remember that either. I'm sure I must have said something about telling them to take it easy, you know, not jumping two or three at a time. The officers there were all, say, older men, the majority of them, so they knew enough to tell them to take it easy.

Q. You gave no instructions to the crew members? A. Me personally, no.

Q. Did you post any instructions for them to read? A. No, not in that regard.

Q. I meant with regard specifically to going up and down the Jacob's ladder. [53]

A. No. They're supposed to be sailors.

Q. I will ask you, Captain, if you know it to be a fact that Malcom E. Potts, the assistant cook that was referred to, had never been to sea before.

Mr. Kennedy: He has answered that.

Mr. Williams: He can answer it.

(Deposition of William J. Accurso.)

Mr. Kennedy: Go ahead.

Mr. Williams: There is no harm in it.

The Witness: I think I did answer that. I don't know whether he was or had been.

Q. (By Mr. Williams): You don't know?

A. I don't know.

Q. Did you make any inquiry among the crew members to ascertain which ones had been to sea before and which ones had not?

A. I don't ask them. They have the papers. The Coast Guard sanctions them to sail under certain grades. They got their papers and that's good enough for me.

Q. And you give them no further instructions then once they come aboard?

A. I wouldn't say that.

Q. Relative to the use of the Jacob's ladder?

A. No.

Q. You do sometimes?

A. I don't, not in the position as master, no, not unless I happen to be standing there and I see something radically wrong, I'm going to tell them.

Q. When did you again see Mr. John Farley following this [54] accident, Captain?

A. I seen him in Yokohama. He was en route to the states. They were bringing him back. The time and date I don't remember. I seen him in the United States Lines' office in Yokohama one morning.

Q. Was that line the local agent for your ship?

A. Yes, U. S. Line.

(Deposition of William J. Accurso.)

Q. You said they were flying him back to the United States then?      A. Yes.

Q. Who informed you of that?

A. He did. Farley.

Q. Did you come to pick him up, to see if he was fit for duty? Was that part of the reason you came to see him?

A. No. We just arrived. I was in there on ship's business. I had to go to the American Consulate. I didn't even know he was in town.

Q. Do you know Captain, at that time that you have reference to in Yokohama, was the ship anchored in the harbor?

A. I don't know whether we were anchored or at a dock.

Q. Did you ask Mr. Farley to come out and get his things that were on the ship?

A. I don't think so. I don't remember now.

Q. I will ask you whether or not you told John Farley that it would be all right for him to come out to get his things, because you had an accommodation ladder rigged at the time?

A. I don't remember that.

Q. You don't remember if you said that or not?

A. No.

Q. And you don't know whether or not you had an [55] accommodation ladder rigged at that time?

A. No, I don't.

Q. Captain, is your memory quite clear as to how the pilot ladder was rigged to the S. S. Aug-



(Deposition of William J. Accurso.)

ustin Daly while in port at Sasebo, Japan? Do you remember quite clearly?

A. As much as I normally would, yes.

Q. Did you come back to the ship the day following Mr. Farley's injury? A. Yes.

Q. In the morning?

A. Yes. We sailed that same morning.

Q. You are sure that the facts with reference to the pilot ladder were exactly as you have stated them?

A. As close as I can remember. That happened quite a while ago.

Q. Captain, you stated that there are passage-way lights where the pilot ladder is fastened to the ship. Are there some both on the main deck and the boat deck? A. Yes.

Q. But you, of course, were not there and you don't know whether or not they were on?

A. I'm sure they were on. When we're working cargo, they all go on at once.

Q. Your answer to my question would necessarily be "no," would it not? You weren't there, were you? A. At night?

Q. Yes, at this time. A. No.

Q. You say there was a cargo light rigged up?

A. Yes.

Q. Did you see that light?

A. Yes. They normally just leave it there in the daytime.

Q. Do you recall exactly where it was fastened?

A. No.

(Deposition of William J. Accurso.)

Q. You don't know whether it was even with the side of the ship, out over the side of the ship or back in from the side of the ship?

A. It would be somewhere on the rail.

Q. Is it on a stand or is it fastened onto the rail itself?

A. They are fastened by a rope to the rail.

Q. Is it fastened on the main deck or the——

A. In that case it would be the higher part. It would be the boat deck. That way it would shine right down.

Q. You say it shines the whole length of the ladder?      A. Yes.

Q. Are you certain of that, under these particular circumstances existing at this time and place, which is April 5, 1952?

Mr. Kennedy: He wasn't there.

Mr. Williams: Excuse me. I will rephrase the question. I realize that.

Q. You had seen this light fixed prior to the time? Had you seen it on at night before?

A. Yes. [57]

Q. Do you know whether or not it would shine down the whole length of that ladder or just a portion of the ladder?

A. There would be sufficient light. There was enough lighting there.

Q. That would depend on where the light was fixed, wouldn't it? Where it was fixed?

A. Yes.

(Deposition of William J. Accurso.)

Q. And you have testified, have you not, that you don't recall exactly where it was fixed?

A. I'm testifying that I don't exactly know. I know it isn't fixed up on the bow, 300 feet away.

Q. You're sure of that?

A. Absolutely. I don't want to argue with you people.

Q. I will ask you if you examined that cargo light closely, Captain, to determine what kind of a bulb it had in it, that particular one? A. No.

Q. Do you know if it had about four, 40-watt bulbs, or whether it had more wattage than that? You did not examine it? A. No.

Q. Your testimony concerning three to five hundred watts just pertains to what is normally furnished? A. Yes.

Q. Captain, while the Augustin Daly was in port at Sasebo, Japan, at the time we referred to, did you make any orders to the chief engineer or any of the other engineers relative to correcting the list of the vessel?

A. If I did, I don't remember now.

Q. Captain, have you discussed with any representatives [58] of the respondent in this case, that is, the United States of America, or with any representatives of its general agent for the voyage involved herein, W. R. Chamberlain & Company, any of the facts leading up to the injury of John Farley?

A. I may have made sure that the injury reports

(Deposition of William J. Accurso.)

were made and the statements and the logbook entries.

Q. Have you discussed the matter with the representatives of the respondent, United States of America, or with its agents involved? A. Yes.

Q. How many discussions have you had?

A. Like this morning, I come in here and looked at the logbook and that statement I made once before. Outside of that——

Q. Do you know how many written statements you have given?

A. One that I know of, that I can remember.

Q. Have you talked to Mr. Kennedy here concerning this matter? A. Yes.

Q. How long did you talk to him about it?

A. I talked to him about an hour, just to refresh my memory. I had forgot all about half this stuff.

Q. Did you read the deposition of your chief mate aboard this vessel, Mr. Glenn A. Morgan?

A. Yes.

Q. You read that?

A. No, I just looked through it.

Q. When did you do that?

A. A little while ago.

Q. Have you talked with Mr. Morgan about the facts [59] leading up to this injury of Mr. Farley since the injury occurred? A. Say that again.

Q. Have you talked with Mr. Morgan, your chief mate, chief mate on this ship, concerning the facts leading up to Mr. Farley's injury since the accident itself happened? Have you talked with



(Deposition of William J. Accurso.)

him about it? A. You mean like the day after?

Q. Well, any time after.

A. Yes, sure. I tried to find out what happened.

Q. And have you talked with him about the matter since you got back to the United States?

A. No. I got off that ship. I haven't seen nor heard of him since.

Q. Of Mr. Morgan?

A. Yes. I haven't seen Mr. Farley since either, since that time in Yokohama. I don't think I have seen him anymore.

Q. Captain, is it your testimony that the reason it is safer to use a pilot ladder than an accommodation ladder under the conditions prevailing in Sasebo at the time previously referred to is that—

A. (Interrupting) This particular instance I thought it was safer to use it and still do under the same circumstances to use a pilot ladder instead of an accommodation ladder, that accommodation ladder.

Q. That particular one?

A. That type on a Liberty ship. All Liberty ships came out originally with that type. [60]

Q. Would your decision have been different—

Mr. Kennedy: I am going to object to that on the ground it has been asked three or four times. It is repetitious and it has been testified to. All of these matters have been testified to previously, both on direct and on cross examination.

Mr. Williams: Captain Accurso, is it your testimony that the reason that an accommodation ladder

(Deposition of William J. Accurso.)

was not as advisable as a pilot ladder under the circumstances at Sasebo, Japan, at the time we have referred to was that the ship might shift? Was that one of the reasons, and that a man might fall from an accommodation ladder more readily than from a Jacob's ladder, is that your testimony?

A. I was afraid of the lurch. That was one of the reasons; the cargo working, the barges, throwing these pilings into the water, everything. There's a lot more involved there than just that particular instance.

Q. How would a sudden lurch of the vessel in the harbor at Sasebo have rendered the use of an accommodation ladder any less safe than a pilot ladder?

A. In this particular case, with the stanchions fairly lower, the ladder itself closer to a horizontal position, if both were used or singularly, they would be up and down and you would have to be stooping over to a slight crouch and hanging on one hand or two hands. Most guys just use one hand, which would be unsafe. It's just a human failing there, and [61] with these steps, of course, with the possibility of slipping through, with that sudden lurch or losing your balance, if there was cargo or barges down there, you're liable to fall down. There's a lot of little matters that come into it. I still maintain that it would be safer to use the pilot ladder.

Q. Captain, have you ever seen planks placed over the steps of an accommodation ladder and

(Deposition of William J. Accurso.)

cleats nailed to the planks so as to avoid the problem of the steep steps?

A. Sure, I have done it myself.

Q. Was there any reason why that could not have been done under these circumstances?

A. It could have been done.

Q. But it would have taken a longer time to do that? A. I think we already had one.

Q. You had a plank to put on?

A. If we wanted to use it. I think we used one up alongside the dock.

Q. That would have disposed of the problem of the steep steps, wouldn't it?

A. As far as slipping through, yes. You could still fall overboard.

Q. But they wouldn't slip on that step?

A. No, not through, no, but by the same token, if you make one level theoretically you are only using one and the other one would be too steep, so where the hell are you?

Q. I didn't understand the last portion of your answer, Captain.

A. Them cleats, they are [62] theoretical up to a point like that (indicating). You're still going to have the low hanging handrail. Okay. If a guy is doping off, that gives him false security. With the possibility of the ship lurching, you could still go in the drink, fall onto the piling that was laying alongside or anything else.

Q. Is it customary to place a net underneath the accommodation ladder?

(Deposition of William J. Accurso.)

A. Not alongside the ship. You can't rig it. The accommodation would normally lay alongside the vessel. There's not outrigger. Under those conditions, no.

Q. Captain, is it a usual and customary thing when men return to the ship from shore liberty that they have been drinking?

A. How would I know? I drink but I can't say that you drink.

Q. Captain, in your experience aboard several vessels, have you frequently seen men come back from shore liberty that have been drinking excessively? A. I have seen it on occasions, yes.

Q. And have you frequently seen men return from shore liberty in a foreign port carrying packages? A. Yes.

Q. How are those packages brought aboard? Are they carried up by the men themselves?

A. It all depends. It all depends on what you're buying, how big they are, what they are.

Q. You haven't any separate means of loading packages [63] unless they are very heavy?

A. No. The individuals buying any stuff, souvenirs or anything for personal use, he takes care of getting that aboard. We don't run any USO or anything, you know. If they buy a set of dishes and it's in two great big cases, it's up to them to get it back, not me or the steamship company.

Q. Captain, I'm going to ask your opinion as to whether or not it would be safer under the conditions prevailing on the U. S. Augustin Daly dur-



(Deposition of William J. Accurso.)

ing its time in Sasebo harbor that we have referred to to have provided an accommodation ladder for crew members returning from shore liberty, particularly when they had been drinking?

Mr. Kennedy: I think you are assuming a fact that is not in issue and I am going to object to that. There is no testimony about any crew members coming back drinking. You are assuming something that has not been testified to and it is not at issue. It isn't a proper hypothetical question.

Mr. Williams: Would you please answer the question?

The Witness: That would be problematical.

Mr. Williams: No further questions.

### Redirect Examination

Q. (By Mr. Kennedy): Captain, I believe you testified that you did not know to what ports you were going when you left the United States, is that correct? A. That's correct. [64]

Q. Did the Navy later give you directions?

A. Yes, radio diversion, orders by diversion, radio.

Q. Did you have any control over what cargo was being loaded aboard the vessel?

Mr. Williams: Objected to as leading.

The Witness: What did you say?

Mr. Kennedy: He has got an objection in there. I will ask you another question, Captain.

Q. Who had charge of what cargo was to be loaded aboard the vessel?

(Deposition of William J. Accurso.)

A. When the Army or Navy charters a merchant ship, they tell you what they are going to load. The only objection the officer on watch or the master has, if it will affect the seaworthiness of the vessel. If it isn't going to affect the seaworthiness of the vessel or the safety of lives or something, it's loaded. That's all there is to it.

Q. What was your opinion with respect to the cargo and the fuel oil, with respect to the seaworthiness of the vessel?

A. It was in seaworthy condition or I wouldn't have gone out.

Q. I take it your answer is that you were in a seaworthy condition.

A. Absolutely. I can't swim and I'm protecting myself.

Q. Now, this tenderness on your trip, did it develop to any appreciable extent during the middle of the voyage?      A. No. [65]

Q. When did it develop to any appreciable extent?

A. When it started, say, being an annoyance the day before. She started taking them flops and lurches.

Q. The day before what?

A. Arrival in Sasebo.

Q. Do you know, Captain, whether or not the filling of the double tanks with sea water would completely correct any tenderness of the vessel?

A. I do. It would.

Q. It would correct it?      A. Absolutely.

(Deposition of William J. Accurso.)

Q. I believe you testified on cross examination that you gave orders not to fill them because——

A. (Interrupting) I mean the orders to fill them would emanate from me, not from the engineer.

Q. Did you give the engineer orders?

A. No. I discussed with him. I decided I didn't want to ballast. The chief engineer heartily agreed with me because that doesn't contaminate the fuel oil.

Q. Did you expect to discharge some cargo in Sasebo?

A. I did.

Q. Did you expect to discharge the deck cargo?

A. Nothing else you could discharge. You have to discharge your deck cargo to get at your hatches.

Q. What effect would discharging deck cargo have upon tenderness of the ship?

A. Eliminate all tenderness, lower your center of gravity—I mean your metacenter.

Q. Did you expect to obtain more fuel in Sasebo, Japan? [66]

A. I did, and fresh water which we got, of course.

Q. Now, Captain, there are several notations in the logbook as to lists. I believe on the date of arrival it states you had a 12 degree port list and then there is a reference later on to a list. Does the logbook necessarily indicate any or all of the flops of the vessel?

A. No.

Q. I will ask you this: What would the logbook indicate insofar as flopping or lists were con-

(Deposition of William J. Accurso.)

cerned? Let me phrase it this way: Would it indicate just permanent lists or every list?

A. It would indicate a permanent list at the time, of course.

Q. Would it indicate every flopping of the vessel?

A. No. A flop could even be more than the list that it would settle on. When it flops, it could go as far as—keel over say as much as 20 degrees maybe, but then it could settle out to 12.

Q. The point I was getting at is, I want to know whether or not the logbook would indicate every flopping of the vessel. A. No, it wouldn't.

Q. That would not be recorded?

A. No. You wouldn't record that anymore than if you are taking sea, you know, heavy water at sea. Just a generalization. You wouldn't say, "0901, took sea. 0902 took another one"—all the way down the line.

Q. I believe you also testified that this Jacob's ladder was not secured on the bottom, near the water? A. No. [67]

Q. Was there any way that that could be secured down there? A. No.

Q. It isn't common practice, is it, to secure Jacob's ladders down at the bottom? A. No.

Q. Now, on April 5, Captain, which is the day before you sailed, do you recall whether the ship had any list at all, whether it still had any list?

A. What's this again?

Q. On April 5, which is the day before your de-



(Deposition of William J. Accurso.)

parture from Sasebo, do you recall whether the vessel had any list?      A. No.

Q. Do you want to check the logbook?

A. Two degree port list, 2100. That was the finish of the cargo.

Q. Now, on cross examination, I have a note here, Captain, that you also testified that the tender conditions of the vessel were not a consideration on April 5, as far as this Jacob's ladder or the accommodation ladder was concerned. Now, I will ask you this: Were there other factors which were still a consideration why the Jacob's ladder was being used on that day?

A. Yes. The cargo work.

Q. And would the deep draft of the vessel have been still one of the considerations?

A. Yes. I forgot that. The draft hadn't changed appreciably.

Q. Now, insofar as your decision was concerned, Captain, to use the Jacob's ladder, were all of those considerations [68] that you have testified to—all of these factors that you have testified to, were they taken into consideration in making your decision?

A. Yes.

Q. In other words, what I am getting at, we have been dividing up some of these various factors. Was your decision based on all of these factors?

A. Yes.

Q. It was all the circumstances that existed?

A. Absolutely, yes. It all boils down to, I still think it was safer to use the pilot ladder. I have

(Deposition of William J. Accurso.)

used it plenty of times since then, working cargo, laying at anchor. By the way, I just finished an 18-month trip out there.

Mr. Williams: I will move the answer be stricken as not responsive to the question.

Q. (By Mr. Kennedy): Now, Captain, can you regulate that accommodation ladder to some extent with falls or whatever you call them? A. Yes.

Q. You have got some degree where you can regulate them, is that right?

A. Yes. You mean up or down?

Q. Yes. A. Yes.

Q. I mean as far as the angle is concerned.

A. Yes.

Q. There was also considerable questions and some testimony about the time required to rig an accommodation ladder. Was that any factor in your decision? A. Safety—

Mr. Williams: Before you answer, Captain, I want the record to show I object to that question as being leading.

Mr. Kennedy: I will rephrase the question. No, I won't. [69] Go ahead and answer. Do you recall the question?

A. Yes. I did it solely for safety, safety angle in my own mind.

Q. Consequently, the time made no difference as far as the accommodation ladder was concerned?

A. No. Under similar circumstances today I would do the same thing. I would have rigged the pilot ladder instead.

(Deposition of William J. Accurso.)

Mr. Williams: I will move that that answer be stricken as not responsive to the question.

Q. (By Mr. Kennedy): Captain, how do you get sailors for any particular trip? How do they come aboard?

A. The companies I work for all got agreements with various unions. Sailors come out of the union hall.

Q. Say, for instance, you want to get two AB sailors. What practice do you follow?

A. I notify the company or the mate does. It depends on the custom of the company. Usually the master informs the office and they in turn order new men through the various unions.

Q. Is that pursuant to various union agreements? A. No.

Q. Do you have any individual say in what crew members—— A. You mean ordering the men?

Mr. Williams: The question is objected to as leading.

The Witness: No. I can just order two AB's. I can't tell them to get Joe or Pete or somebody like that.

Q. (By Mr. Kennedy): Now, Captain, on cross examination you [70] were asked as to whether you had talked to me about this particular case. I believe you testified that you looked over the log.

A. Yes.

Q. And glanced through the deposition of the chief mate and you were here for about an hour. What did I tell you about this testimony, Captain?

(Deposition of William J. Accurso.)

A. What did you tell me? You said for me to tell the truth and that's all, to the best of my recollection, and if I don't remember, to refresh my memory in the logbook if it became necessary.

Q. Did I give you any instructions to testify in a certain manner or anything like that, Captain?

A. No.

Q. In other words, there was no dirty work afoot here? A. No.

Q. As far as I have been coaching you or anything like that? A. No.

Mr. Williams: That last question is objected to as leading.

Mr. Kennedy: I believe that is all except for the question about signing the deposition.

#### Recross Examination

Q. (By Mr. Williams): Captain, I believe you testified that the decision to use the pilot ladder rather than an accommodation ladder was dictated partly by something in regard to cargo work. Do you have reference—I believe you previously testified that [71] a barge might run into the accommodation ladder if it was down. Is that what you had primary reference to?

A. No. The swinging of these long—not primarily, but the barges—if the barge is moving back and forth, you can't manipulate the cargo by hand, so they have to keep moving the barges which continually get in the way of the accommodation ladder. Not only that, by swinging these long timbers,



(Deposition of William J. Accurso.)

they're kind of awkward too. They can swing around. If that lets go, it can possibly come in and bang against there.

Q. That same situation would exist to the pilot ladder too, if there were men on the pilot ladder, they could get hit also if a timber swung around?

A. Not exactly. You've got these bridles leading down the accommodation ladder. It could hit any part of that and still result in a blow and make you possibly lose your balance. The pilot ladder, it would have to hit in that local area, that 14 or 16-inch width, whatever it happened to be.

Mr. Williams: I have no further questions.

#### Further Redirect Examination

Q. (By Mr. Kennedy): Captain, where can you rig an accommodation ladder on the vessel?

A. Accommodation ladders are so made in most cases you can only hook them up where they are made to be hooked up, connect up with the gangway platform and the falls where they [72] have the bridle and the davit arms available. The pilot ladder, you can move them anywhere along the vessel from the bow to the stern on either side.

Mr. Kennedy: Captain, you have a right to read and sign this deposition or you can waive that right if you wish. Now, do you care to read and sign it or do you wish to waive that right?

The Witness: I would just as soon waive it.

[Endorsed]: Filed March 16, 1955.

RESPONDENTS' EXHIBIT No. 11  
DEPOSITION OF S. L. JOHNSON

\* \* \* \* \*

## S. L. JOHNSON

called as a witness by the respondent, being first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

## Direct Examination

Q. (By Mr. Krause): Your name is S. L. Johnson?  
A. That's right.

Q. Where do you live, Mr. Johnson?

A. 1148 and a half 53rd Street in Oakland.

Q. Is that 53rd?  
A. That's right.

Q. And what is your occupation?

A. Elevator operator on the S. S. Lurline.

Q. Generally speaking what has your occupation been before being on the Lurline?

A. I have been on several ships before that, so I have been on different jobs.

Q. That is within the Steward's Department usually?

A. Always in the Steward's Department.

Q. You haven't gone to sea as a seaman? I mean, as a sailor or Engine Room employe?

A. No, I haven't.

Q. How old are you?  
A. 28 years old.

Q. Is California your birth place?

A. I was born in Pine Bluff, Arkansas.

Q. Now, were you a member of the crew of the Augustin Daly back in 1952?  
A. Yes, sir.

Q. How were you employed on that ship?

A. As a messman. [3]

(Deposition of S. L. Johnson.)

Q. Do you know just roughly the months that you were on the ship?      A. Yes.

Q. Could you tell us?

A. March the 2nd I went aboard the ship, on Sunday morning, 1952.

Q. About when did you leave her?

A. March—not March; August, about the 15th, if I'm not mistaken.

Q. During that time where did the vessel go?

A. She left Portland, Oregon for Japan, but she ended up in Sasebo.

Q. Before you left the ship she returned to this country too, didn't she?      A. That's right.

Q. But after the vessel left Portland, the first port of call was Sasebo in Japan?

A. That's right.

Q. Do you know about when she got to Sasebo?

A. I can't recall the day. No, I can't. I only know it takes around 28 or 30 days to get there, so you can figure April something, around April 2nd or something.

Q. At Sasebo did the ship discharge cargo there?

A. It did.

Q. How did she discharge? Was she tied to a dock or was she at anchor?

A. She was anchored.

Q. Do you recall just generally what kind of cargo she had?

A. She had lumber and— that's what she had on deck. I don't know what they had in the holds or hatches. I don't know. [4]

(Deposition of S. L. Johnson.)

Q. On the trip over to Japan, was the ship pretty deeply loaded or did she not have a full cargo?      A. She was loaded.

Q. Now, did you have any occasion to go ashore while you were at Sasebo?      A. Yes.

Q. How did you go ashore?

A. We went ashore on a Bumboat.

Q. It is a launch, is it, that transports members of the crew from the ship to the shore?

A. That's right.

Q. This boat, do you know whether that was provided by the shipowner or did you have to provide the boat, the men that went ashore?

A. It wasn't by the shipowners, I don't think. I don't know who it was owned by.

Q. I don't mean owned by. I meant provided. Did you have to pay for the riding on the boat?

A. No.

Q. The boat came to the ship and took you off and then later brought you back again? What kind of a boat was it, Mr. Johnson?

A. Well, it was a Japanese boat. I couldn't say what kind it was. All I know, it was, like you said, it was a launch. What kind of a boat it was I couldn't tell.

Q. We don't want to know exactly. We just generally want to know how big it was.

A. Like I say, it was much larger from here to that door there (indicating). I wouldn't say too much wider, but it was longer. [5]

Q. You were pointing to the length of the room



(Deposition of S. L. Johnson.)

we are in, but could you give us some rough idea of about how many feet long you think this boat was?      A. I'd say from 30 to 40 feet.

Q. Now, it was propelled by an engine of some kind, wasn't it?      A. Yes.

Q. Do you recall whether it had any covered spaces on the boat? Was there a roof over any part of the boat?

A. Well, like I say before, I can't remember that. I know naturally they had one over the engine, I'm sure, but I can't say they had one over the top where that man was guiding the boat or not, I couldn't say.

Q. Where the men were riding, you don't know whether that was covered or not?

A. No. Naturally, a certain part of it would have to be covered because for the Engine Department.

Q. But my question was, you don't recall whether the place where you were sitting and the other men were sitting in the launch, whether that was covered with a roof?      A. I can't say.

Q. Now, when you left the ship, do you remember how you got from the ship to this launch?

A. Like I was saying before, we had a ladder, you know, not a Jacob's ladder, but actually a gangplank that let you down.

Q. An accommodation ladder?

A. I don't—

Q. A ladder with real steps on it?

A. That's right. [6] If I'm not mistaken, we

(Deposition of S. L. Johnson.)

went down on that. I'm not sure of that. Anyway, when we came back, we didn't go back on that ladder because maybe the current came in or something and we didn't go back. Anyway, we went back up the Jacob's ladder.

Q. You don't recall then how you went down——

A. (Interrupting) No, I can't.

Q. ——from the deck of the ship to this Bum-boat? A. I can't say.

Q. But the only means that you could have used would either have been the accommodation ladder or the Jacob's ladder? A. That's right.

Q. Do you recall roughly about what time of day you left for shore?

A. Well, I think it was around six o'clock, something like that, or maybe five-thirty. I would say six.

Q. About how long did it take to get to shore from the ship?

A. I'd say half an hour, forty-five minutes.

Q. How long did you remain ashore?

A. All afternoon until that night.

Q. Now when you say "afternoon," is it still afternoon after six o'clock in the evening?

A. Well, in the evening then.

Q. I mean, just so we understand each other here, it's afternoon all right, but most of us understand that as being from noon until about supper time. You remained ashore until around midnight or so? A. Yes. [7]

(Deposition of S. L. Johnson.)

Q. Do you remember any other members of the crew that went ashore that evening too?

A. This gentleman that got hurt. I forget his name. Mr.—what's his name?

Q. The fellow that was hurt later that evening, that night? A. Yes. Was his name Mr. Farley?

Q. Garley. A. Mr. Farley.

Q. Do you know whether he was an engineer on the ship?

A. Yes, sir, he was. I think he was the second, if I'm not sure, and Mr. Goodry.

Q. Do you remember the name of any other man that went ashore with you?

A. Not actually know their name. I know them when I see them.

Q. Was there a fellow on by the name of Potts on the ship? A. Yes.

Q. Did you know him? A. Yes.

Q. Was he on the boat with you when you went ashore? A. Yes, sir.

Q. Now, while you were ashore, just tell us generally what you did?

A. Well, we had a few drinks and I——

Q. You are talking about Potts now?

A. That's right, Potts. We had a few drinks. We bought souvenirs, went sightseeing and we came back to the ship that night.

Q. How did you get back to the dock from up-town?

A. We came back in a taxi, Japanese taxi, if I can [8] recollect.

(Deposition of S. L. Johnson.)

Q. Is that an automobile? A. Yes, sir.

Q. And from the taxi to the Bumboat, how did you navigate? A. We walked.

Q. You walked?

A. It's only a small distance from there to the dock.

Q. We are just wanting to know whether you were under your own power, or whether somebody was carrying you. A. Nobody carries me.

Q. Was Potts on his own feet too?

A. As far as I can remember he was.

Q. And Goodry?

A. Goodry, like I said before, I don't remember that Mr. Goodry came back with us or not. I can't say. He might have, but I can't say definitely.

Q. Now, were you and Potts together all evening, or were you separated at any time?

A. As far as I can remember, we were together most of the afternoon. I mean, the whole day.

Q. The whole evening, from six o'clock on?

A. Until that time we came back.

Q. You don't recall being separated at all, that you weren't with him for a period of time?

A. I might have been out of his company for five or ten minutes.

Q. You don't think it was longer than that? How did you get your drinks that evening and where? [9] A. I don't remember the club.

Q. We don't care about that. What I was just wondering is whether you bought a bottle or sat down in the bushes somewhere.



(Deposition of S. L. Johnson.)

A. We went to a tavern.

Q. Was it a place where they sold hard liquor too? I mean, whiskey.

A. No, it was a club.

Q. A club?

A. Yes.

Q. Was it a place where they sold whiskey?

A. Naturally, yes.

Q. I'm not familiar with that and we are asking you therefore to tell us. Did they also serve beer?

A. Yes.

Q. Are those liquors that they sell there Japanese liquors or do you buy American whiskey too, like Old Crow and stuff like that?

A. If I can remember, they had American brands and Japanese, if I can remember right.

Q. Is that American beer too?

A. Yes. They had American beer and Japanese beer.

Q. Do you remember what kind you were drinking that night?

A. No, I don't. To tell you the truth I would have drank anything there. We had been at sea for quite some time. Anything would have been all right with me.

Q. Do you remember what you did drink? Was it both whiskey and beer or either one of them?

A. Just drinking beer, that's all.

Q. Just tell us about when you returned to the boat on the return trip. What your condition as to whether you were [10] sober or intoxicated?

A. I was sober.

Q. What about Potts?

(Deposition of S. L. Johnson.)

A. As far as my opinion, he was sober too.

Q. Did you see Mr. Farley, the engineer, up in Sasebo at all, after he went ashore?

A. Only saw him when they was down on the dock fixing to catch the bumboat to come back to the ship.

Q. Did you observe Mr. Farley too as to whether he was apparently sober or not?

A. Well, like I said before, I never saw Mr. Farley drink before and at that time I didn't think he was drinking then. I didn't pay too much attention to him.

Q. You saw nothing that indicated that he wasn't under proper control?      A. Yes.

Q. Did you see anything about Potts that would indicate that he wasn't sober?

A. No. He wasn't drunk as far as my opinion. You know, a person can have one beer and get high, or they can have nothing at all and still be the same thing as far as jolly. As far as my opinion, he wasn't intoxicated.

Q. Now, when the Bumboat got back to the ship, it laid up alongside the ship, I suppose?

A. Yes.

Q. And what sort of means was provided there for getting on the ship?      A. A Jacob's ladder.

Q. Can you tell us just about what a Jacob's ladder is made of and what it consists of? [11]

A. It's made of wood like the rest of the ladders are, and ropes and you have to climb up the ladder, you know. It's kind of like a net. You

(Deposition of S. L. Johnson.)

have to climb up the ladder. That's the only way I can describe it.

Q. The steps themselves were made of what? Wood or rope? A. Wood. That's all.

Q. And the sides of the ladder were made of what? A. They are made of rope.

Q. Do you know where that ladder is fastened on the ship?

A. I can't remember. Like I said before, I don't know whether it was the boat deck or A deck or what. I know it was above the deck that we were sleeping on.

Q. It was above the main deck? A. Yes.

Q. What deck is immediately above the main deck? A. It would have to be the boat deck.

Q. Can you tell us whether there was any light there? This was at night time, wasn't it?

A. Yes.

Q. After midnight sometime?

A. It could have been. I don't know exactly. It was around midnight or a little after, something like that.

Q. And I suppose it is dark in Sasebo around midnight? A. Yes.

Q. When you got to the ship and particularly this Jacob's ladder, can you tell us anything about the lighting conditions?

A. If I can remember correctly, it was a light up above where the ladder was tied. I can't say [12] definitely, but I think it was a light up there, but I'm not positive, but I'm sure it was.

(Deposition of S. L. Johnson.)

Q. Do you recall whether you were able to see the ladder?

A. Yes. Anyone could see the ladder if he wasn't blind.

Q. Did you climb up the ladder too?

A. Yes.

Q. Were you able to see the steps? A. Yes.

Q. Now, when you got to the foot of this Jacob's ladder, can you tell us just what happened?

A. When I got on the Jacob's ladder?

Q. When the Bumboat got there to the foot of the Jacob's ladder, just tell what you saw.

A. Well, just a—went aside the ship so they could let the crew off going aboard the ship. That's all. I don't know who went up the ladder first, but anyway Potts went up there and he fell down. That's all. I don't know who went up first, but someone went up before him.

Q. Before Potts?

A. Yes, if I remember right.

Q. Do you know whether you went up ahead of Potts? A. No, I didn't.

Q. You did not go up ahead of Potts? Can you tell us about where you were when Potts was going up the ladder?

A. I was standing from the Jacob's ladder, say as far as from here to that door, I imagine. I mean from here to that wall.

Q. How many feet would that be?

A. I'd say ten feet. [13]



(Deposition of S. L. Johnson.)

Q. Do you have any recollection of where Mr. Farley was standing?

A. I couldn't say definitely. Evidently he must have been standing awful close to the ladder for him to fall. If a person falls they don't fall straight down. They don't fall—I couldn't say he was standing by the ladder or close to it.

Q. Did you see about from where Potts fell off the ladder, how far up he got before he fell?

A. I couldn't say. I don't know whether he was at the top or bottom, I don't know. He must have been quite a ways up when he fell. I don't know how far.

Q. Do you recall whether Potts was carrying anything as he went up the ladder?

A. Yes. He was carrying something, some packages. I don't know what they were. To my judgment I know he was carrying some souvenirs. What they were, I don't know.

Q. Do you know whether he had bought some souvenirs when he was ashore that night?

A. Yes. We had bought souvenirs together.

Q. Can you tell us roughly what kind of souvenirs they were? Were they clothing or toys or what?

A. We had bought clothing and toys and cigarette lighters and what not. A few souvenirs, but not too much to make too much packages. You know, small items.

Q. Tell us what your best recollection is as to

(Deposition of S. L. Johnson.)

how many packages Potts had as he went up the Jacob's ladder. [14]

A. I couldn't say. I don't know how many packages he was carrying.

Q. You do recall that he was carrying something? A. That's correct.

Q. Do you know whether any of those things he was carrying were bottles?

A. To my knowledge, I don't know. He could have been carrying bottles or he could not. I don't know.

Q. Had you, yourself, bought any whiskey while you were ashore or anything in bottles?

A. As far as I remember, no.

Q. You don't recall buying anything ashore that was in a bottle? A. No.

Q. Either beer or whiskey or anything like that?

A. As far as beer, you are going to get beer in bottle or cans, one or two, I don't remember.

Q. I am talking about whether you carried any back. A. No, I didn't carry any back.

Q. Do you recall whether Potts carried any bottles back for you?

A. If I remember—no, I can't.

Q. You don't remember that? A. No.

Q. What was your first knowledge of the fact that Potts fell, or was falling?

A. Someone said, "Watch out. The guy's falling." That was that. That's all. Like I said before, it happened so quick—

Q. Someone yelled? [15]

(Deposition of S. L. Johnson.)

A. You couldn't realize what happened.

Q. Someone did yell, you say?

A. Yes. Someone said, "The guy is falling."

Q. When you heard this warning given, what did you do?

A. I looked up and down and the man was there.

Q. And the fellow was falling?

A. He was there. That's all.

Q. Did you see what Potts landed on? I am not asking you for what you figured out. Did you see where he landed?

A. When the man says someone is falling, I can't remember just what he said, and the next thing I knew Mr. Farley was laying on the deck on that boat.

Q. Farley was laying on the deck?

A. Evidently he must have hit the guy. Like I said, it happened so quick, you just couldn't say.

Q. Do you recall, with respect to the ladder, was Farley closer to the foot of the ladder than you at the time?

A. He could have been, I'm sure he was.

Q. I'm asking you for your recollection. That is, was Farley closer to the foot of the ladder than where you were standing?

A. I'll say he was.

Q. And do you recall whether there were any other men between you and Farley?

A. I couldn't say, no.

Q. You don't recall?

A. No.

Q. Did Potts hit you too, when he came down?

A. No.

(Deposition of S. L. Johnson.)

Q. Did Potts get up under his own power after he had [16] fallen?

A. If I can remember, he did.

Q. Do you know how he got aboard the ship after he had fallen down the ladder?

A. If I can remember right, he went back up the ladder.

Q. That is your recollection that he went back up the ladder under his own power? Did he sail from Sasebo with you? A. Yes.

Q. Did he continue with his work during that time or was he in the ship's hospital?

A. He continued with his work.

Q. Did Mr. Farley return to the ship as far as you can recollect?

A. If I can remember right, I think Mr. Farley went to the hospital that particular night.

Q. And he didn't return to the States on the Augustin Daly? A. No, he didn't.

Q. You climbed that ladder after Potts had fallen off of it? A. I did.

Q. Did you experience any difficulty climbing it?

A. No, I didn't.

Q. Do you recall whether you climbed it with both hands free, or carrying packages?

A. If I can remember right I was climbing it with both hands free.

Q. Did you have any packages that you took back aboard the ship?

A. Yes, I did have some packages.

Q. How did they get aboard the ship?



(Deposition of S. L. Johnson.)

A. Right now, if I'm not mistaken, I think that we had— [17] after the accident happened, I think we put a rope around the rest of the packages and brought them up.

Q. With a heaving line?

A. Yes. If I'm not mistaken I think that's what happened. After the accident we drew them up with a line.

Mr. Krause: I think that is all. Mr. Williams will ask you some questions.

### Cross Examination

Q. (By Mr. Williams): Mr. Johnson, have you been to sea prior to this voyage on the *Augustin Daly*? Had you shipped before that?

A. Yes, I had.

Q. As as messman or similar category?

A. Waiter, messman, pantryman.

Q. Had you been on Liberty-type vessels before?

A. Never had been on a Liberty before that one.

Q. Were you in the Navy during the war?

A. No, sir. I was in the Army.

Q. Had you climbed a Jacob's ladder prior to this occasion? Before the time of this injury to Mr. Farley, had you climbed a Jacob's ladder before then?

A. Yes, at fire and boat drill. We have them on all American ships and I climbed Jacob's ladders before that.

Q. On previous voyages, or this voyage?

A. Previous voyages.

(Deposition of S. L. Johnson.)

Q. Did you ever climb one for other purposes, other than [18] for fire and boat drill?

A. I have climbed before that besides fire and boat drill, on other ships, yes.

Q. How long had you been at sea prior to this particular accident? How many years?

A. 1946 I started to sea.

Q. Did you ship pretty regularly?

A. Off and on.

Q. Were you out on at least one ship every year, between '46 and 1952? A. Yes.

Q. I believe you estimated the length of the Liberty launch or Bumboat, as you call it, to be about 30 or 40 feet long? A. Yes.

Q. About how wide would you say?

A. I'd say it was about as wide as this room. It could have been. I wouldn't say definitely, but I'd say it's as wide as this room.

Q. Eight or nine feet?

A. Something like that.

Q. When you arrived in Sasebo, did you go ashore the first night you were there?

A. The first night, I think we did. I don't know, sir. I'm sure we did go ashore the first night. I'm not positive. I think we did go ashore the first night.

Q. Did you go ashore before this particular time when Mr. Farley was injured?

A. The accident happened in the afternoon, right? We had to go ashore that morning. I mean

(Deposition of S. L. Johnson.)

that afternoon, rather, before the accident happened. Is that what you mean? [19]

Q. What I mean is had you gone ashore at Sasebo on this voyage before the time that you have just related when you went in at six o'clock and came back around midnight. Had you gone ashore on a day before that, or at any time when the ship was in the harbor? A. Yes.

Q. You had already been ashore and back?

A. If the ship had been in before that, naturally we went ashore. If the ship came in the same day and the accident happened the same day—I don't know what you are trying to say, if I was in there two days or three days or what. Whatever day that happened, we had been ashore before that, if we had been in there longer.

Q. As soon as the ship reached port, you were given shore liberty and you went ashore?

A. That's right.

Q. You are not sure whether that was before this accident or whether the accident occurred the first time you went ashore? You're not sure about that, is that correct? A. Yes.

Q. Is it your recollection that you went down the accommodation ladder, but the Jacob's ladder was there when you came back, is that correct?

A. Yes.

Q. Do you remember what sort of a seating arrangement this liberty launch or Bumboat had on it? In other words, where did you sit on it to go ashore or return to the ship? A. Beg pardon?

(Deposition of S. L. Johnson.)

Q. Where did you sit in the liberty launch? [20]

A. They had some benches there to sit on.

Q. Did the benches run the same way the boat did?

A. Same way the boat did.

Q. They ran bow to stern? A. Yes.

Q. About how many men went ashore, do you remember?

A. I couldn't say.

Q. Well, you have mentioned, I believe, going ashore with you were three other men whose names you have given?

A. Yes.

Q. There were other men besides that?

A. Yes, but I can't remember their names naturally. I do know Mr. Potts and if I can remember, Mr. Goodry and myself.

Q. You mentioned Farley too?

A. Yes. I don't remember whether he went ashore with us or not. He could have went earlier or later.

Q. You aren't sure he went ashore with you?

A. With us, but he did come back with us.

Q. When you got ashore, were you and Mr. Potts, you say, together all the time after you got ashore until you came back?

A. If I can remember, yes.

Q. Was anybody else with you? For example, was Mr. Goodry with you?

A. Mr. Goodry was with us for a while if I can remember right.

Q. Part of the time? A. Yes.

Q. When you first arrived ashore, where did you go? [21]



(Deposition of S. L. Johnson.)

A. I couldn't recollect now just exactly where we went right offhand. We went someplace. I don't know exactly where we went straight when we left the dock.

Q. But shortly after you got there, is this correct, shortly after you arrived ashore, you went to some bar where you had some drinks? A. Yes.

Q. You and Mr. Potts? A. Yes.

Q. That is Malcolm Potts, isn't it? Isn't that his name?

A. I know his name was Potts. I never did know his first name.

Q. What is his position aboard ship?

A. He was the 3rd cook on the ship.

Q. And do you know how long you stayed in the first place you stopped in? A. No, I don't.

Q. Could it have been a couple of hours?

A. I wouldn't say hours. I couldn't say whether it was a couple hours or a couple minutes.

Q. You haven't any idea? A. No.

Q. Do you recall in general this whole incident very clearly? A. Yes.

Q. You recall it quite clearly? A. Yes.

Q. Did Mr. Goodry come back to the Augustin Daly with you? A. If I'm not mistaken, he did.

Q. Now, you don't know the calendar day that this accident occurred on, do you, just offhand?

A. No, I don't. [22]

Q. After you got out of the bar that you said you went to, where did you go after that?

A. Bought souvenirs.

(Deposition of S. L. Johnson.)

Q. That was in the evening? The stores were generally open then? A. Yes.

Q. What were these souvenirs, Mr. Johnson?

A. Pajamas, smoking jackets, cigarette lighters, and other articles. I can't remember exactly what all we did buy.

Q. Did you buy any bottles any time you were ashore there? A. I don't remember.

Q. I don't refer to bottles of beer that you drank ashore, but did you buy any whiskey bottles or any other hard liquor in bottles?

A. Not that I can remember, no.

Q. I take it if you don't remember buying any you don't remember bringing any with you then, is that right? A. That's right.

Q. And do you know if Mr. Potts did that?

A. As far as I remember, no. Mr. Potts didn't buy any as far as I can remember.

Q. Do you know if Mr. Goodry did?

A. I couldn't say, sir, because like I say, he wasn't with us all the time.

Q. Did you see Mr. Goodry with any bottles at any time? A. No, I didn't.

Q. About what time did you get back to the dock where the liberty launch was leaving from? [23]

A. I couldn't say exactly what time we came back onto the dock because it taken us around forty or fifty minutes to get from the dock to the ship, so I couldn't say exactly what time we was down there. Maybe a half hour, forty-five minutes. Could have been that. I don't know exactly.

(Deposition of S. L. Johnson.)

Q. Would it be your general recollection it was around midnight that you got to the dock?

A. No.

Q. It would be earlier or later? A. Earlier.

Q. Did you wait at the dock, you and Mr. Potts?

A. Yes, we did.

Q. For quite some time?

A. I'd say a short period of time we waited.

Q. Do you mean fifteen minutes?

A. Maybe half an hour. I don't know.

Q. Did you wait right at the dock, standing right out on the——

A. Outside of the dock. You don't stand right there for the launch to stop. You wait on the dock. That's where we waited.

Q. Were there other men waiting there with you? A. Yes.

Q. Who was there?

A. I can't remember the names.

Q. Was Mr. Farley with you?

A. Yes, he was there.

Q. He waited there with you for some time?

A. Yes.

Q. It is your testimony, is it not, that you were sober then, you and Mr. Potts were both sober?

A. I was sober and Mr. Potts was sober as far as I can [24] remember. I don't think—the man wasn't drunk.

Q. Mr. Potts wasn't drunk? A. No.

Q. And you weren't drunk? A. No.

(Deposition of S. L. Johnson.)

Q. In your mind is there someplace in between sober and drunk?

A. Well, there is two different things, a man drunk and sober. I wasn't drunk and I knew he wasn't drunk.

Q. I'm asking, Mr. Johnson, if you were someplace in between being sober and drunk, if you can recall.

A. I was sober.

Q. You would say you were sober? A. Yes.

Q. What about Mr. Potts? A. He was sober.

Q. About how many men went back on that liberty launch?

A. Well, I couldn't say exactly how many men went back on the launch. I don't remember.

Q. You don't remember?

A. I don't remember.

Q. Well, you have only mentioned about three men. There were more men than that that went back, weren't there?

A. I was speaking of the men I knew went back.

Q. I realize that. You don't mean to indicate that there were not other men that went back besides those that you have mentioned, do you?

A. Naturally, other men went back. Otherwise, Mr. Farley wouldn't have got hurt.

Q. I don't mean that, Mr. Johnson. I mean, to your recollection were there at least ten men going back?

A. Could have been more. Could have been less.

Q. Do you remember where you sat in this [25] launch on your way back?



(Deposition of S. L. Johnson.)

A. No, I don't remember.

Q. Do you remember if you talked to Mr. Farley at any time on the way back?

A. I don't remember that either. I don't remember talking to Mr. Farley at all.

Q. Is it your recollection that you didn't talk to Mr. Farley? Is that your memory or your recollection?

A. That's right.

Q. Did you observe Mr. Potts talking to Mr. Farley at any time?

A. No. Him and I was talking together.

Q. Was Mr. Farley by himself or did he have some friends with him, or do you remember?

A. I can't remember.

Q. On the way back from the dock to the Augustin Daly, you said you thought that would take about a half hour?

A. I would say something like that.

Q. Were you to go on duty on the ship when you got back?

A. No. The next morning.

Q. The next morning? A. Yes.

Q. Do you know if Mr. Potts was to go on duty at the same time you were or not?

A. I couldn't say.

Q. You don't remember? A. No.

Q. On the way back was it a fairly quiet voyage, or noisy or what, as far as you remember?

A. It was quiet.

Q. You don't remember any boisterous activity by crewmen going back on the launch?

(Deposition of S. L. Johnson.)

A. You mean unnecessary noise or something like that?

Q. Yes, singing or noise.

A. As far as I can remember, no. [26]

Q. Do you remember any arguments?

A. No.

Q. It was quiet as far as you can recall?

A. Yes.

Q. Do you recall where you were sitting on the launch itself?      A. No, I can't say.

Q. You don't remember if you were forward near the bow or toward the stern?

A. I can't say. I was sitting somewhere on that Bumboat, but I don't know exactly forward or aft. I don't know where, but I was sitting. I don't know where I was sitting, 'midships or where.

Q. Were you sitting on a bench?      A. Yes.

Q. Was Mr. Potts sitting next to you?

A. Not next to me. He was sitting there. He could have been standing up. I don't know.

Q. You don't recall where he was?

A. No.

Q. Do you recall where Mr. Farley was?

A. No, I don't.

Q. When the launch got back to the Augustin Daly, did it pull up alongside the Jacob's ladder that you have referred to?      A. It did.

Q. Where would you say the launch pulled alongside of it? That is to say, was it even with the bow, or 'midships, or astern of the liberty launch?

(Deposition of S. L. Johnson.)

A. I'd say about 'midships; well, you couldn't say 'midships, because the bridge isn't 'midships, the bridge is 'midships, isn't it?

Q. I have never seen this vessel, Mr. Johnson.

A. Well, I'd say it was 'midships then.

Q. You would say the ladder was about amidship on the liberty launch? A. Yes.

Mr. Krause: Wait a minute. Are you talking about the ladder being amidships on the Augustin Daly or the liberty launch?

Mr. Williams: That it was amidships on the liberty launch.

Mr. Krause: Did you understand that?

The Witness: That is what I was answering.

Mr. Krause: He was asking whether the bridge was amidship on the liberty launch. You better just ask him that again to make sure.

Mr. Williams: We will go right through that, Mr. Johnson.

Q. As the liberty launch pulled alongside the Jacob's ladder, where was the Jacob's ladder with relationship to the liberty launch, the Bumboat?

A. I'd say it was 'midships.

Q. Was there any sort of a cabin or engine house or wheelhouse on this liberty launch?

A. It was a wheelhouse, yes. I don't recollect any cover was over it or not. There could have been or could not. I couldn't say.

Q. How much of a crew did this liberty launch have?

A. Well, they had the men that they brought

(Deposition of S. L. Johnson.)

back off the dock. I don't know how many men it was.

Q. You don't know how many men they used [28] to run the liberty launch? A. No.

Q. Were they Japanese?

A. Japanese, if I can remember.

Q. How did the launch hold itself alongside the Augustin Daly in unloading the men?

A. How did they what?

Q. How did they hold themselves alongside?

A. I am sure they tied the launch up there. I don't remember now how they did it, but I'm sure they tied it up.

Q. Do you recall just what happened as soon as the liberty launch stopped there? Did all the men get up? What happened to the best of your recollection? A. I don't remember.

Q. Did the men in general get up and start moving forward toward the Jacob's ladder?

A. I couldn't say.

Q. You don't remember? Were you standing in line, or anything like that to go aboard this——

A. No.

Q. You were just standing there?

A. Just standing there waiting to go up, that's all.

Q. You were waiting your turn? A. Yes.

Q. Do you think you were as much as ten feet away from the ladder? A. Yes.

Q. Had you gotten up from your bench?

A. Yes, I had stood up.



(Deposition of S. L. Johnson.)

Q. Do you know if you had walked any distance yet?      A. No.

Q. You don't know where on the liberty launch [29] Mr. Farley was at the time?

A. No, I couldn't say where he was standing but I'm sure he was in front of me.

Q. Do you think he was a little closer to the——

A. The ladder than I was?

Q. Yes.      A. I'm sure he was.

Q. Was anybody standing right around him?

A. I don't remember.

Q. It is your recollection that someone yelled when Mr. Potts was falling, just prior to his landing down there, is that right?

A. Yes. Someone yelled. I don't know who it was. Someone did holler that someone has fallen.

Q. Do you know if it was somebody in the liberty launch or somebody up on the vessel?

A. If I remember, it was someone in the launch was saying—yelling that someone was falling.

Q. You didn't see him fall, though?

A. When the man fell, I didn't actually see him.

Q. You didn't see him in the air?

A. No, but when I saw him they was both lying down. It happened so quick. Somebody said the man was falling and then it happened just like that.

Q. When the launch pulled alongside the Augustin Daly was there anyone from the crew on the ship up topside that you remember?

A. I can't remember that.

(Deposition of S. L. Johnson.)

Q. Did you watch Mr. Potts going up the ladder, or did you not pay any particular attention to him? [30]

A. No, I didn't. I didn't pay any attention.

Q. And when he fell, did you go over to see if he and Mr. Farley were all right?

A. Yes, I did. I went over to the both of them.

Q. Did Mr. Potts say anything to you then?

A. If I can remember right, he said, "I'm not hurt too bad," or something, but Mr. Farley was giving awful groans and someone was trying to take care of him. I went over to try to give a hand.

Q. Did you see any other men get struck by the body of Mr. Potts besides Mr. Farley? A. No.

Q. Do you know whether or not there were?

A. Not to my recollection.

Q. Did you see any of these packages that you had reference to? Did they come down when Mr. Potts fell?

A. I'm sure they did, if he was carrying them.

Q. What I mean is, did you see any fall on the liberty launch?

A. I can't remember, sir. I don't know exactly. They must have fell. I can't remember seeing any, though.

Q. I am going to ask you if you remember a bottle breaking on the deck of the liberty launch?

A. As far as I can remember, no.

Q. You don't remember?

A. Not any bottles breaking, no.

Q. Do you know if Mr. Potts picked up any

(Deposition of S. L. Johnson.)

[31] packages after he fell and went up the ladder with them?

A. I don't remember that either.

Q. Was this launch arriving back at the Augustin Daly at the regular time, or was this the regular return time for the launch to the vessel?

A. Well, those launches didn't have no certain time to go back to the ship. They go any time.

Q. Well, didn't you have a set time when the launch would——

A. Leave the dock?

Q. I was going to say first, leave the vessel, takes you ashore, and leave the dock and takes you back. Was there a schedule worked out for that?

A. Don't put this down. I'm not sure if it was the right time for the ship launch to come back or not. All I knew, it came back on time. I don't know whether it was the schedule or wasn't. I don't know now. It could have been.

Q. You said you thought somebody went up the ladder before Potts. Do you know who it was?

A. No, I don't. I really don't know who it was.

Q. Mr. Johnson, have you been contacted by representatives of the respondent in this case? That is, the United States of America, before you came here to have your deposition taken?

A. Yes, sir.

Q. You talked to them at times about this accident and how it happened?

A. I have talked to two gentlemen. I don't know who they were. I talked to this gentleman here. [32]

(Deposition of S. L. Johnson.)

Mr. Krause: Pointing to Mr. Krause.

The Witness: Mr. Krause, there. And I talked to—I talked to three gentlemen. I talked to a gentleman in Pier 35 in April, I think it was.

Q. (By Mr. Williams): Of what year? Of this year?

A. Yes, this year. If I'm not mistaken, I think it was. I talked to a gentleman in Los Angeles the last time I was down there.

Q. You say Pier 35. You mean here in San Francisco?

A. Yes. I talked to a gentleman in Los Angeles. I have his card in my wallet.

Q. And that has all been in this year?

A. Yes.

Q. Did these gentlemen tell you who they were representing?

A. They were speaking of this same case, here.

Q. Were they representing, you might say, the ship, or the United States of America or were they representing Mr. Farley, or do you know?

A. I can't remember.

Q. You don't remember? A. No.

Q. Have you ever met me or talked to me before this deposition? I am not one of the persons you have reference to, am I?

A. I don't know. Have you ever talked to me?

Q. Mr. Johnson, I can't testify. I might tell you privately that we haven't, but you don't recall?

A. No, I don't remember seeing you before.

Q. Did you make a report to your officers after



(Deposition of S. L. Johnson.)

this accident had occurred on board ship, or did they ask you for a report?      A. No.

Q. No one asked you for a report?      A. No.

Q. Did they ask you to have a written statement or anything as to your recollection of what occurred?      A. No.

Q. When is the first time that you were contacted about this accident after it happened and before now? Has it all been in this year, 1955?

A. This year.

Q. Did you go any place else while you were ashore, Mr. Johnson, in Sasebo, that you recall, other than to just to a bar and have some drinks and to buy some souvenirs?      A. No.

Q. That is all you did?      A. Yes.

Q. You didn't go to any other business establishment for any other purpose that you can recall?

A. No.

Q. Did you have a haircut?      A. No.

Q. You had been to sea then for about 30 days, hadn't you?

A. That's right, something like that.

Q. Did you go to more than one bar or did you just go to one?      A. Just one.

Q. Where was that one located in Sasebo?

A. I don't know.

Q. Was it right near the dock?

A. It wasn't near the dock. It was somewhere up in town. [34]

Mr. Williams: I have no further questions.

Mr. Krause: I have nothing further.

(Deposition of S. L. Johnson.)

Mr. Johnson, you will be entitled to see this deposition and to sign it if you wanted to check it over, what the reporter has gotten, but you can also waive that signature if you want to, and I think that the reporter heard everything all right that you said and he is a good reporter, so undoubtedly he has written it down just as you said, so do you want to waive your signature?

The Witness: I would like to read it over myself first.

Mr. Krause: That is going to be a little bit complicated.

The Witness: I can't read shorthand at all.

Q. (By Mr. Krause): You are going to sea on the Lurline. What day do you leave here?

A. We leave here Monday afternoon at four o'clock.

Q. That is tomorrow afternoon. Do you have to be aboard ship tomorrow?

A. I have to be at fire and boat drill tomorrow morning at 9:30. The only way I can get off is get excused and it would have to be a good reason.

Q. After 9:30 can you get excused and get away from the ship again?

A. Well, fire and boat drill lasts about eleven o'clock and I have to be at work at twelve-thirty.

Q. You will be operating an elevator on the Lurline?

A. From then until 5:00 o'clock. [35]

Q. Do you expect to be anywhere around Portland during the next week?

(Deposition of S. L. Johnson.)

A. No, sir. We never go to Portland. When we leave here, we go to Honolulu and from there to Los Angeles and back to Honolulu and then 'Frisco.

Q. You are sailing between California and Hawaii? A. That's right.

Q. You expect to remain on that ship, in the next month? A. Yes.

Mr. Krause: Off the record.

(Off the record discussion by direction of respective counsel.)

Q. (By Mr. Krause): Mr. Johnson, are you willing to waive the reading and signing of your deposition?

The Witness: Yes. [36]

[Endorsed]: Filed July 25, 1955.

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[Endorsed]: No. 15221. United States Court of Appeals for the Ninth Circuit. John Farley, Appellant, vs. United States of America, Appellee. United States of America, Appellant, vs. John Farley, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed: July 26, 1956.

Docketed: August 3, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15221

JOHN FARLEY,

Appellant and Cross-Respondent,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD

John Farley, appellant above-named, hereby:

(1) Adopts in full as his Statement of Points on Appeal libelant-appellant's Assignment of Errors previously filed herein for consideration by the above entitled Court upon this appeal; and

\* \* \* \* \*

/s/ DAVID R. WILLIAMS  
Of Proctors for Appellant  
WILLIAMS & ALLEY

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 3, 1956. Paul P. O'Brien,  
Clerk.

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[Title of Court of Appeals and Cause.]

APPELLEE'S AND CROSS-APPELLANT'S  
STATEMENT OF POINTS

Appellee and cross-appellant, United States of  
America, hereby: \* \* \* \* \*



(2) Submits the following Statement of Points upon which it intends to rely:

1. The District Court erred in overruling appellee's exceptions to the libel.

2. The District Court erred in holding (a) that the libel stated facts sufficient to constitute a cause of suit against appellee, (b) that it had jurisdiction to hear and determine this suit, or (c) that it had jurisdiction over the person of appellee.

3. The District Court erred in holding that the sole proximate cause of appellant's injuries was the negligence of appellee's servant Potts.

4. The District Court erred in finding that at the time of the accident appellee's employee Potts was acting within the scope of and in the course of his employment.

5. The District Court erred in holding that no acts or failure to act on the part of libelant proximately caused or contributed to his injuries.

6. The District Court erred in failing to find that appellant was negligent (a) in disregarding his duty to warn Potts of the danger of climbing the ladder with his hands encumbered, (b) in failing to keep a lookout for his own safety, and (c) in standing at the foot of the ladder while Potts was ascending with hands encumbered.

7. The District Court erred in awarding a decree against appellee for maintenance, cure and medical treatment.

8. The District Court erred in entering a decree awarding general and special damages to libelant in any amount.

C. E. LUCKEY,  
United States Attorney for Oregon,  
Proctor for appellee and cross-  
appellant, United States of  
America

/s/ GUNTHER F. KRAUSE,  
Of counsel for proctor for appellee  
and cross-appellant, United States  
of America

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 4, 1956. Paul P. O'Brien,  
Clerk.

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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**BRIEF FOR APPELLANT**

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Appeal from the United States District Court  
for the District of Oregon.

Honorable William G. East, Judge.

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**FILED**

APR 15 1957

WILLIAMS & ALLEY,  
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1212 Failing Building,  
Portland 4, Oregon,  
For Appellant.

PAUL P. O'BRIEN, CLERK





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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**BRIEF FOR APPELLANT**

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Appeal from the United States District Court  
for the District of Oregon.

Honorable William G. East, Judge.

**JURISDICTION**

This is an appeal from a final decree entered by the District Court in a libel in personam filed pursuant to the Suits in Admiralty Act.

46 U.S.C.A., Sec. 742 to 752.

The cause involves the liability of the respondent-appellee, the United States of America, for an injury to a seaman which occurred in the course of

the seaman's employment with appellee on April 6, 1952, in the harbor of Sasebo, Japan.

46 U.S.C.A., Sec 688.

Decree was entered in favor of libelant-appellant on March 23, 1956. Notice of Appeal and Petition for Appeal were filed on June 20, 1956, and Order Allowing Appeal entered the same day. In his Notice of Appeal and Petition for Appeal, this appellant has indicated that he desires only to review one question involved in the cause, to wit: the gross inadequacy of general and special damages awarded libelant by the trial court.

### **STATEMENT OF THE CASE**

Appellant was very seriously injured and permanently disabled by an accident occurring on April 6, 1952, in the harbor of Sasebo, Japan. He was then employed as Second Assistant Engineer aboard the S.S. AUGUSTIN DALY, a Liberty Ship owned and operated by appellee. At the aforementioned time and place, another crewman aboard appellee's vessel negligently fell a distance of approximately twenty feet from a "Jacob's" ladder and landed on appellant's head and shoulders.

The crushing blow rendered appellant unconscious for several hours and caused multiple fractures to his spine and clavicle, together with extensive soft tissue injuries to the back and shoulder. Appellant was removed to shore and was first hos-

pitalized in Japan for 19 days. While in severe pain, he was repatriated to the United States, arriving here approximately two months after his injury. He was thereafter placed in the United States Public Health Service Hospital in Seattle, Washington, four times during the ensuing 13 months for casts and treatment. He was also given outpatient treatment at the United States Public Health Service Clinic in Portland, Oregon, between the periods of his hospitalization. The total period of his hospitalization exceeded three months. After the United States Public Health Service refused him further treatment, appellant, Farley, obtained the services of a private physician, Dr. Richard F. Berg, an orthopedic specialist (Tr. 196-199, 206). Under Dr. Berg's care, Farley undertook a series of physical therapy treatments which lasted nearly a year, and was being so treated at the time of trial (Tr. 200).

Except for one night's employment as a relief Port Engineer, appellant was totally and continuously unemployed from the date of injury on April 6, 1952 to the time of trial, July 27-29, 1955 (Tr. 197, 198, 206).

Stated briefly, the trial court found that by reason of appellee's negligence, appellant:

(1) Was permanently and totally disabled from following his usual occupation or any other heavy employment.

(2) Was permanently disabled to the extent to fifty percent from performing any light duty employment.

(3) Had suffered considerable pain and distress and would permanently suffer pain and distress.

(4) Was permanently deprived of his earnings as a second assistant engineer in the approximate amount of \$700.00 per month.

The trial court awarded appellant the woefully inadequate sum of \$8500.00 as general and special damages for his loss of wages to the time of trial, loss of anticipated future wages, and permanent pain, suffering and disability.

## **STATEMENT OF POINTS ON APPEAL**

**The Trial Court Erred in Its Findings, Conclusions and Decree Dated March 23, 1956, in Failing to Award Appellant Adequate General and Special Damages**

## **SUMMARY OF ARGUMENT**

- (a) The award of \$8500.00 was grossly inadequate to compensate appellant for the loss of past and future wages, and pain, suffering and disability, caused by the injuries and permanent disability which the trial court found appellant sustained.
  - (b) Under the evidence and Findings of Fact Nos. 7, 8, and 9, the trial court should have found appellant's full damages to be in an amount not less than \$96,000.00.
- (1) Wage loss to date of trial was \$24,349.59.



- (2) Future wage loss was \$57,532.85.
- (3) Award for pain, suffering and disability should be at least \$15,000.00.
- (c) This Court has the power to and should rectify the trial court's error by an adequate award of compensatory damages.

### ARGUMENT

- (a) Award of \$8500.00 Grossly Inadequate to Compensate Appellant for Loss of Past and Future Wages, and Pain, Suffering and Disability, Occasioned by Injuries and Permanent Disability Which Trial Court Found Appellant Sustained.**

The trial court's findings respecting appellant's injuries and disability are set forth in Findings of Fact Nos. 7, 8, and 9 (Tr. 40, 41) as follows:

"7. That libelant's injuries proximately caused by respondent's servant's negligence were a concussion and nervous shock, fracture of the right clavicle, fractures of the seventh, eighth, tenth and twelfth dorsal vertebrae, a severe wrenching and tearing of the muscles, ligaments, tendons, and soft tissues of the right shoulder and back, an irritation of the nerves in the back area, a traumatic capsulitis or fibrosis of the right shoulder joint, and an aggravation of a dormant pre-existing osteoarthritis of the spine.

"8. That by reason of said injuries, libelant has suffered considerable pain and distress, will permanently suffer pain and distress, has sustained a permanent limitation of motion in

the right shoulder joint, a permanent limitation of motion and instability of the dorsal spine, a loss of strength and gripping function of the right arm and hand, and has become totally and permanently disabled from following his usual and ordinary occupation of merchant marine engineer or any other heavy employment, and is further permanently disabled to the extent of fifty per cent from performing light duty employment.

"9. That at the time of libelant's said injury he was a healthy robust man, capable of engaging in strenuous labor, of the age of 58 years, with a life expectancy under United States Life Tables, 1949-1951, of 17.05 years, earning the approximate sum of \$700.00 per month, exclusive of room and board, as a second assistant marine engineer; that libelant was, excepting one day, unemployed from the date of his injury, April 6, 1952, to the date of trial, July 27, 1955, as a result of said injuries; that since August 13, 1952, libelant has lost wages and will lose further wages by reason of said injuries."

These findings are fully supported by the testimony of appellant and the two medical experts called by the respective parties. However, these findings are wholly inconsistent with Finding of Fact No. 10 (Tr. 41) which finds appellant's general and special damages to be in the amount of \$8,500.00.

There was no question that appellant Farley sustained the clavicle fracture and the multiple compression fractures of his dorsal vertebrae from Potts' body striking him on the head and shoulders. Both doctors testified that a traumatic injury suf-

ficient to cause multiple compression fractures could reasonably be expected to cause extensive permanent damage to the muscles, ligaments and other soft tissues in Farley's right shoulder and back. The preexistence of osteo-arthritis to an extent normally found in a man of appellant's age and occupation was reported by both doctors. The testimony of Dr. Berg was that such a preexisting condition was probably aggravated by a severe traumatic injury such as appellant received. Both doctors testified that appellant will probably always have pain because of his injury in addition to total disability from heavy employment. Dr. Berg further testified that appellant's injuries will prevent him from following light employment to the extent of fifty percent.

It was stipulated in the Pretrial Order (Tr. 17) and in open court (Tr. 212) that at the time of his injury appellant was earning base wages of \$435.89 per month plus overtime at the rate of \$1.96 per hour and his room and board on the vessel. As will hereinafter be set forth in detail, the undisputed evidence showed that appellant's average monthly earnings, exclusive of room and board, were approximately \$700.00 at the time of his injury, and that his average annual employment was between ten and eleven months. The evidence was further undisputed that the base wages for appellant's employment and the overtime pay applicable thereto were substantially raised by an industry wage agreement effective June 16, 1953.

The trial court's award of damages for past and future wage loss, pain, suffering and disability, was approximately equivalent to appellant's anticipated loss of wages for one year. As such, the award of damages (Finding of Fact No. 10) was wholly devoid of evidentiary support.

**(b) Under Evidence and Findings of Fact Respecting Injuries Full Damages Should Be Not Less Than \$96,000.00.**

The trial court entered no findings respecting the various elements of general and special damages for which the award was made. Where damages are fixed by a court it is the usual practice to make separate evaluations of the several elements of damages which constitute the award. **U.S.A. vs. Luehr** (C.C.A. 9th, 1953), 208 F. 2d 138; **Johannsson vs. U.S.A.** (D.C. N.Y., 1949), 1949 A.M.C. 1802; **U.S.A. vs. Puscedu** (C.C.A. 5th, 1955), 224 F. 2d 5; **Hilderbrand vs. U.S.A.** (D.C. N.Y., 1954), 134 F.S. 514, affirmed (CC.A. 2d, 1955) 226 F. 2d 215.

We shall set forth under appropriate subheadings the damages to which appellant is entitled under the evidence and Findings of Fact Nos. 7, 8, and 9:

**(1) Wage Loss to Date of Trial Was \$24,994.13.**

The printed portion of appellant's Exhibit No. 7 (Tr. 457) consists of a summary of wages earned by Farley aboard appellee's vessel, S.S. AUGUSTIN DALY, in the year of his injury 1952. The title of



the exhibit erroneously states the period to commence February 2, 1950, which should read "February 2, 1952," the date appellant signed aboard the vessel. Although this exhibit and appellant's testimony (Tr. 216-218) show that he sustained a substantial wage loss between the date of his injury, April 6, 1952, and the end of the voyage (August 13, 1952), no claim is made for lost wages prior to August 13, 1952.

The amount of appellant's base wages (\$435.89 per month) and hourly rate of overtime pay (\$1.96) at the time of his injury were, as aforementioned, agreed upon by the parties. The appellant introduced evidence which was uncontradicted concerning his average monthly overtime earnings and the average number of months of his employment per year.

Appellant testified that his average overtime earnings were between \$200.00 and \$250.00 per month at the time of his injury (Tr. 211, 212). This testimony was borne out by appellant's Exhibit 7 (Overtime Statements Aboard S.S. TRANSOCEANIC), which covers appellant's overtime earnings in the year immediately preceding his injury. This exhibit shows that he earned 778 hours of overtime aboard the S.S. TRANSOCEANIC between May 16, 1951 and December 16, 1951, a period of six months, or an average monthly overtime of 129.8 hours. It is further shown by appellant's Exhibit 7 (Pay Data from W. R. Chamberlin

& Co., Tr. 457) that he earned base wages and overtime aboard the S.S. AUGUSTIN DALY of \$1,361.55 from the beginning of his employment to the date of his injury, a period of two months and four days, plus his room and board valued at \$139.85 during said period, a total of \$1,501.40. Appellant's 1951 income, as reported on his Federal Tax Return, was \$7,648.73 (Tr. 213) for his eleven months of employment aboard the S.S. TRANS-OCEANIC, an average of \$695.34 per month. Appellant further testified that his average annual employment varied between ten and eleven months. It follows that appellant's wage loss for the year August 14, 1952 to August 13, 1953 should be computed as \$700.00 per month x 10.5 months, a total of \$7,350.00.

Appellant's Exhibit 5 (entitled "Agreement Between National Marine Engineers' Beneficial Association and Pacific Maritime Association, dated November 1, 1951, effective date: June 16, 1953) shows that the basic wage for second assistant marine engineers sailing on Liberty ships was on June 16, 1953 increased to \$531.23 per month (also see Tr. 214-215). The "Liberty" (Class C) vessel category is selected because appellant's U. S. Coast Guard Continuous Discharge Book (Appellant's Exhibit 6) shows that the last seven vessels on which he sailed were "Liberty" ships (also see Tr. 108). The above referred to Exhibit 5 also shows that the overtime pay scale was changed from \$1.96 per hour to \$3.29 per hour effective June 16, 1953.

The latest industry wage agreement in effect at the time of trial (also appellant's Exhibit 5, effective June 16, 1954) shows that the same pay scale as was adopted on June 16, 1953, was then in effect both as to monthly wages and overtime.

If we assume that appellant's monthly overtime would have remained at the 1951 level of 129.8 hours (appellant's Exhibit 7), by application of the new industry wage agreement, he would have had monthly overtime pay of \$427.04 after June 16, 1953, or combined earnings of \$958.27. However, assuming conservatively that appellant would have earned only 100 hours of overtime per month after June 16, 1953, his earnings from this source would have been approximately \$329.00 per month. His combined earnings would then have been \$860.23 per month. This figure multiplied by 10.5 months (appellant's average annual employment) shows an annual wage loss of \$9,032.41 for the year August 14, 1953 to August 14, 1954.

For the period August 14, 1954 to the date of trial, July 27, 1955, appellant's wage loss would be  $348/365$ ths of \$9,032.41, or \$8,611.72.

We feel that no reasonable question can be raised concerning appellant's total disability for gainful employment from the date of his injury to the time of trial. The medical witnesses called by the respective parties stated that appellant is permanently and totally incapacitated from any heavy employment such as he has followed at sea for the

thirty years preceding his injury. Further, appellant was following a course of physical therapy treatment prescribed by his physician up to the time of trial which had improved the disability of his right shoulder and arm to some extent. He attempted to return to work (one engineer's night watch in September 1953—Tr. 197, 198, 206) and was found unable to perform the work. Prior to his treatment by Dr. Berg commencing in 1954, the marked disability of his right shoulder, together with his extensive and painful back injuries, prevented any other employment.

Appellant's special damages shown by the evidence are thus summarized as follows:

Wage Loss, August 14, 1952 to August 13, 1953.....	\$ 7,350.00
Wage Loss, August 14, 1953 to August 13, 1954.....	9,032.41
Wage Loss, August 14, 1954 to July 26, 1955 .....	8,611.72
<b>TOTAL.....</b>	<b>\$24,994.13</b>

It is to be noted from the printed excerpt from Respondent's Brief (Tr. 29) that appellee's estimate of Farley's wage loss during this period was \$15,000.00.

**(2) Future Wage Loss Was \$57,532.85.**

As was previously pointed out, there was no substantial conflict between the medical experts as to the extent of appellant's permanent total disability from his customary occupation or from any



strenuous employment. As aforementioned, the medical evidence and the Court's findings were that appellant is permanently disabled to the extent of fifty percent from performing light duty employment.

The evidence was clear that no definite date of retirement is fixed by law or practice for a marine engineer (Tr. 384, 385, 393, 394, 465, 466). The duties of a second assistant marine engineer require occasional, but not continuous, heavy labor (Tr. 67). Appellant testified that he expected to go to sea for at least ten or twelve more years from the date of his injury, or until 1962 or 1964 (Tr. 396). If the shorter period is taken, we find that in 1962 appellant will be 68 years of age. From 1955 to 1962 is a period of seven years during which appellant would probably earn \$9,032.41 per year, as previously computed, or \$63,226.87.

The next question is whether, and to what extent, this amount should be reduced by the earning ability which appellant still possesses. Just what employment a man of appellant's age, training, and physical disability would be able to find is extremely tenuous. What employer would hire a disabled marine engineer who is able to do only half-time light duty employment? As was stated in the case of **Drlik vs. The Imperial Oil, Ltd.** (D.C. Ohio, 1955), 141 F.S. 388:

"We cannot expect that employers will invent jobs to fit the particular kind of physical incapacities from which this man suffers as the result of this injury."

However, it is fair to assume that the part-time light duty employment which appellant might reasonably be expected to obtain would not produce earnings in excess of \$150.00 per month. It follows that an extremely conservative estimate of appellant's reduction in earning ability by reason of this accident would be eighty percent. Accordingly, a corresponding twenty percent reduction in appellant's probably anticipated earnings during the period July 1955 to July 1962 (\$63,226.87) would result in a net figure of \$50,581.50.

Appellant was 58 years of age at the time of his injury and his average life expectancy according to United States Life Tables, 1949-1951 (Appellant's Exhibit 10) was 17.05 years. Appellant stated that, following his retirement from the sea, he would expect to stand night watches on ships in port as a relief engineer. It was stated by both appellant (Tr. 396) and by Captain Larson, expert witness called by appellee (Tr. 385), that such is the common practice by the older marine engineers. Inasmuch as appellant's only trade or calling is that of marine engineer, it is reasonable to assume that he would continue to follow this occupation as long as his physical ability permitted. The compensation for such work is shown in the latest industry wage agreement (Appellant's Exhibit 5, page 21), effective date: June 16, 1954—Tr. 395) to be \$2.92 per hour, or \$23.36 for a eight-hour shift. Relief engineers are employed in American ports so that the engine room crew of the vessel

may be given shore liberty (Tr. 394, 395). If appellant worked only 13 days per month as a relief engineer, he would earn in excess of \$300.00 per month. Since he is incapable of performing these duties and can perform only half-time light duty employment, his earning ability during this period has been impaired at least fifty percent. Appellant is therefore entitled, at the very least, to compensation for a loss of earnings at the rate of \$150.00 per month for the period from age 68 to age 75. For the seven years involved, this amount totals \$12,600.00.

The anticipated wage losses of \$50,581.50 and \$12,600.00, totalling \$63,181.50, should then be subjected to the annuity computation at the customary three percent discount rate. The amount of \$57,532.85 results from such computation which appellant represents to be his true future wage loss.

It is again to be observed from the printed excerpt from Respondent's Brief (Tr. 29) that appellee makes a more conservative estimate of appellant's future wage loss: \$20,000.00.

We submit that appellant's computation of future wage loss is in conformity with that approved by this court in the 1953 case of **U.S.A. vs. Luehr**, cited *supra*. An allowance for progressive decline in earning ability has been made without regard to the continuing decrease in the purchasing power of money. If consideration is given to the ever ascending spiral of wages and prices, appellant's estimate of future wage loss has indeed been conservative.

**(3) Award for Pain, Suffering and Disability Should Be at Least \$15,000.00.**

As to an award for pain and suffering, the evidence showed that appellant has suffered varying degrees of pain ever since his injury (Tr. 189, 207). Further, his injuries, and particularly the multiple spinal fractures, were very serious and required his hospitalization in Japan and transportation while in considerable pain back to the United States (Tr. 188-194). Upon his arrival in this country approximately two months after his injury, appellant became a bed patient in the United States Public Health Service Hospital in Seattle where he was placed in a full body cast for approximately 2 months (Respondent's Exhibit 5 and Tr. 194). During the ensuing thirteen months, appellant was hospitalized in the same facility on three additional occasions for periods of time varying between 10 and 22 days (Respondent's Exhibit 5). Between these periods of hospitalization appellant reported to the United States Public Health Service Clinic in Portland for outpatient treatment a total of 95 different times (Respondent's Exhibit 6). After the United States Public Health Service refused him further treatment (Tr. 196), appellant contacted a private physician for additional medical care (Tr. 199).

Under the advice of Dr. Richard F. Berg, an orthopedic specialist, appellant underwent a series of extensive physical therapy treatments (Tr. 280-281) which commenced in September 1954 and con-



tinued to the date of trial. (Libelant's Exhibit 9 and Tr. 200-202). Appellant drove from his home to Portland (a distance of 12 miles) for the treatments which were given between three and five times per week over a ten month period. At the time of trial, appellant had considerable pain in his back upon bending, lifting, prolonged standing, or the continued use of his right arm. Over three years after his injury, appellant obtained relief from pain only by lying down, and was assisted in doing household chores by wearing a back brace (Tr. 209). In the opinion of the two orthopedic specialists called as witnesses by the respective parties, appellant's pain will last for the remainder of his life (Tr. 292, 368).

In addition to this permanent pain, appellant's disability will seriously restrict him from enjoying normal diversionary activities. This is sometimes recognized as a separate element of damages under the heading of "disability" or "loss of enjoyment." **Johannsson vs. U.S.A.**, 1949 A.M.C. 1802. In the last above cited case, the injured seaman sustained the loss of a leg. In our view, appellant's loss is much more disabling because he must always live with an injured back which causes him pain upon movement. Appellant is entitled to the comfort of his later years free from unnecessary pain, discomfort, and disability. The loss of life's enjoyment by becoming a premature invalid or partial cripple is a compensable element of damages.

The case of **The Imperial Oil, Ltd. v. Drlik** (C.C.A. 6th, 1956), 234 F. 2d 4, is perhaps the latest Court of Appeals case wherein a trial court's award for pain and suffering was considered at length. Therein the Court of Appeals for the Sixth Circuit approved a formula used by the trial court (**Drlik vs. The Imperial Oil, Ltd.**, 141 F.S. 388) for finding damages for pain and suffering sustained by a 64-year old dock hand. The Court computed the award for pain and suffering as follows:

- \$100.00 per day for the first month of hospitalization.
- \$50.00 per day for the second month of hospitalization.
- \$20.00 per day for the next four months of hospitalization.
- \$100.00 per month after discharge from the hospital, and until the time of trial.
- \$100.00 per month for libelant's life expectancy on a 3% annuity basis.

The ascertainment of an amount which will adequately compensate appellant for his past and future pain, suffering and disability rests within the sound discretion of this Court. It is earnestly and respectfully suggested that, by virtue of the violent character of his injury, the lengthy course of his medical treatment, and the permanent character of his pain and loss of enjoyment, a compensatory award therefor should be at least \$15,000.00.

**(c) Appellate Court Can and Should Award Compensatory Damages.**

An appellate court may increase an award in admiralty.

**Standard Oil Company vs. Southern Pacific Co.**, 268 U.S. 146, 155, 45 S.Ct. 465, 69 L.Ed. 890;

**The Spokane** (C.C.A. 2d), 294 F. 242, cert. den., 264 U.S. 583, 44 S.Ct. 332, 68 L.Ed. 861;

**Drowne vs. Great Lakes Transport Corp.** (C.C.A. 2d, 1925), 5 F. 2d 58;

**Fauntleroy vs. Argonaut S.S. Line** (C.C.A. 4th, 1929), 31 F. 2d 941;

**Menefee vs. W. R. Chamberlin Co.** (C.C.A. 9th, 1950), 183 F. 2d 720.

The cases of **U. S. Fidelity & Guaranty Co. vs. U.S.A.** (C.C.A. 2d, 1945) 152 F. 2d 46, and **Heredia vs. Davis** (C.C.A. 4th) 12 F. 2d 500, are authority for an appellate court's increase of an inadequate award for plain and suffering.

This Court has jurisdiction to and should correct the trial court's error by rendering an adequate award which is truly compensatory. A good statement of this power of final disposition is contained in two recent admiralty cases decided by this Court: **Menefee vs. W. R. Chamberlin Co.**, 176 F. 2d 828, 49 A.M.C. 1388, and **Rice Growers' Association of California vs. Rederiaktiebolaget Trode**, 171 F. 2d 662:

“ This Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to

make such disposition of the case as justice may at this time require;' and 'The rule is the more insistent, because in admiralty cases are tried **de novo** on appeal.' "

An award should be made by this court in conformity with well-recognized standards for ascertainment of damages. As a guide to the Court, cases containing a carefully reasoned approach to damages in seamen's injury cases are:

**U.S.A. vs. Luehr** (C.C.A. 9th, 1953), *supra*;  
**Johannsson vs. U.S.A.** (D.C. N.Y., 1949),  
*supra*;

**U.S.A. vs. Puscedu** (C.C.A. 5th, 1955), *supra*;  
**Drlik vs. Imperial Oil, Ltd.** (D.C. Ohio, 1955), *supra*, modified in **Imperial Oil, Ltd. vs. Drlik** (C.C.A. 6, 1956), *supra*;

**Hilderbrand vs. U.S.A.** (D.C. N.Y., 1954), *supra*, affirmed (C.C.A. 2d, 1955), *supra*;  
**Lundy vs. Calmar S.S. Corp.** (D.C. N.Y., 1951), 96 F.S. 19;

**McCarthy vs. U.S.A.** (D.C. N.Y., 1950), 88 F.S. 251;

**Stokes vs. U.S.A.** (D.C. N.Y., 1944), 55 F.S. 56, modified (C.C.A. 2d, 1946), 144 F. 2d 82.

## CONCLUSION

There is no question that the trial court's award of damages was grossly inadequate under the undisputed evidence and the findings of injury, disability, and wage loss. This Court should experience no difficulty in fixing an adequate award and finally disposing of this case, because of the trial court's findings and the lack of conflicting evi-



dence. We respectfully submit that such an award should be in the amount of at least \$96,000.00.

Respectfully submitted,

WILLIAMS & ALLEY,  
DAVID R. WILLAMS,  
Proctors for Appellant.



No. \_\_\_\_\_

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

JOHN FARLEY,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee,*

UNITED STATES OF AMERICA,

*Appellant,*

vs.

JOHN FARLEY,

*Appellee.*

---

**BRIEF OF APPELLEE AND APPELLANT,**  
**UNITED STATES OF AMERICA**

---

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FILED

MAY 25 1957

PAUL P. O'BRIEN, CL





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No. ....

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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JOHN FARLEY,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee,*

UNITED STATES OF AMERICA,

*Appellant,*

vs.

JOHN FARLEY,

*Appellee.*

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**BRIEF OF APPELLEE AND APPELLANT,**  
**UNITED STATES OF AMERICA**

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**JURISDICTION**

This is an appeal from a final decree entered by the District Court in admiralty on March 23, 1956. A decree was entered in favor of libelant-appellant and a notice of appeal by United States of America and order allowing appeal were filed and entered on June 20, 1956. Libelant-appellant appealed on the ground that the

award was inadequate, and respondent-appellant, United States of America, appealed from the entire decree.

This brief combines the answer of United States of America to the brief for appellant, John Farley, and the opening brief in its appeal from the decree.

### **STATEMENT OF POINTS ON APPEAL**

1. The District Court erred in overruling appellee's exceptions to the libel.

2. The District Court erred in holding (a) that the libel stated facts sufficient to constitute a cause of suit against appellee, (b) that it had jurisdiction to hear and determine this suit, or (c) that it had jurisdiction over the person of appellee.

3. The District Court erred in holding that the sole proximate cause of appellant's injuries was the negligence of appellee's servant Potts.

4. The District Court erred in finding that at the time of the accident appellee's employee Potts was acting within the scope of and in the course of his employment.

5. The District Court erred in holding that no acts or failure to act on the part of libelant proximately caused or contributed to his injuries.

6. The District Court erred in failing to find that appellant was negligent (a) in disregarding his duty to warn Potts of the danger of climbing the ladder with his hands encumbered, (b) in failing to keep a lookout for

his own safety, and (c) in standing at the foot of the ladder while Potts was ascending with hands encumbered.

7. The District Court erred in awarding a decree against appellee for maintenance, cure and medical treatment.

8. The District Court erred in entering a decree awarding general and special damages to libellant in any amount.

### **STATEMENT OF FACTS ON JURISDICTION**

Farley was employed by the United States as a seaman aboard the SS "AUGUSTIN DALY" (Tr. 16). The vessel was owned and operated by the United States. W. R. Chamberlin & Co. acted as the shoreside husband for the vessel pursuant to what is commonly known as a "general agency" agreement (Tr. 16).

Farley sustained injuries on April 6, 1952, in the port of Sasebo, Japan, when another seaman fell on him. On March 25, 1954, Farley mailed a notice of claim to W. R. Chamberlin & Co. and to the United States Maritime Administration (Tr. 16; Lib. Ex. 4, Tr. 455).

On April 2, 1954, Farley filed his libel in the District Court against the United States and alleged therein that his claim was deemed administratively disallowed (Tr. 4). The claim has never been expressly accepted or rejected by any administrative agency of the United States (Tr. 16).

It appeared on the face of the libel and subsequent

proceedings clearly disclosed that the libel was filed eight days after Farley had mailed his claim. There was no evidence introduced as to the date when the claim was actually received by W. R. Chamberlin & Co. or by the Maritime Administration.

At all times involved in this case the claim provisions of the Clarification Act of March 24, 1943, Ch. 26, 57 Stat. 45, 50 U.S.C.A. App. 1291 (hereinafter referred to as "Clarification Act") as re-enacted by the Act of June 2, 1951, 65 Stat. 59, 46 U.S.C.A. 1241(a) (hereinafter referred to as "1951 Act") were in full force and effect.

It was and is the position of the United States that it has not consented to be sued in this or similar cases until an administrative claim has either been expressly disallowed or presumptively disallowed by the expiration of 60 days from the date of the filing of the claim.

The United States contended throughout the proceedings below that the District Court did not have jurisdiction and that the libel and pretrial order did not state facts sufficient to constitute a cause of suit against the United States.

These contentions were first presented to the District Court by exceptions to the libel filed by the United States (Tr. 8-10). These exceptions were overruled by the lower court without an opinion (Tr. 10-11). The answer of the United States denied the allegation in the libel that the claim was deemed administratively disallowed and further denied the admiralty and maritime jurisdiction of the court (Tr. 12, 13).



A pretrial order was entered in this case. The lack of jurisdiction was asserted as a defense by the United States and it was listed as a separate issue to be decided by the court (Tr. 23, 24). The lower court did not enter any specific finding with respect to its jurisdiction but merely found as a conclusion of law that it had jurisdiction over the parties and the subject matter of the suit (Tr. 41).

The jurisdictional question and the failure of the libel to state facts sufficient to constitute a cause of suit was reserved for decision on appeal by the statement of points filed by the United States (Tr. 653).

The jurisdiction of this Court over this appeal is conferred by 28 U.S.C.A. 1291 and 28 U.S.C.A. 1294(1).

### **STATUTES INVOLVED**

The Clarification Act of March 24, 1943, Pub. Law 17, Ch. 26, 78th Cong., 57 Stat. 45, 50 U.S.C.A. App. 1291, provides in relevant part as follows:

"That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b)(2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clauses (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the

United States employed as seamen on privately owned and operated American vessels. . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. . . . When used in this subsection, the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration."

The relevant sections of the Clarification Act were re-enacted by Congress in 1951. The Act of June 2, 1951, Pub. Law 45, Ch. 121, 82nd Cong., 65 Stat. 59, 46 U.S.C.A. 1241(a), provides in connection with the "Vessel Operations Revolving Fund" in relevant part as follows:

"Provided, That the provisions of sections 1(a), 1(c), 3(c) and 4 of Public Law 17, Seventy-Eighth Congress (57 Stat. 45), as amended, shall be applicable in connection with such operations and to seamen employed through general agents as employees of the United States, who may be employed in accordance with customary commercial practices in the maritime industry, notwithstanding the provisions of any law applicable in terms to the employment of persons by the United States:"

## ADMINISTRATIVE REGULATIONS INVOLVED

Pursuant to the authority contained in the Clarification Act, the War Shipping Administration issued rules and regulations with respect to suits against the United States and the requirements of administrative claims. General Order 32, April 22, 1943, 8 Fed. Reg. 5414, 46 C.F.R. 304.20-304.29.

General Order 32 provides in relevant part as follows:

"304.20 *Statutory provisions.* Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels owned by or under bareboat charter to the War Shipping Administration and operated by an Agent under a General Agency form of Service Agreement, with respect to the claims hereinafter specifically enumerated, are given all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on American flag vessels privately owned and operated. Under such Act, court action (1) may not be instituted to enforce such a claim until it shall have been administratively disallowed, in whole or in part, and (2) must be brought pursuant to the Suits in Admiralty Act."

"304.23 *Court action, condition precedent.* No seaman or his surviving dependent or beneficiary or legal representative having a claim under the provisions of sections 304.21 and 304.22, [refers to injury, maintenance and cure, etc.] shall commence a court action for the enforcement of such claim, unless such claim has been filed by him or on his behalf or by or on behalf of his surviving dependent or beneficiary or legal representative as provided in sections 304.24 and 304.25 and has been adminis-

tratively disallowed by the person or agency with whom it was so filed."

"304.26 *Claim, when presumed administratively disallowed.* If the person or agency with whom the claim is filed, in accordance with the directions contained herein, fails to notify the claimant in writing of a determination upon such claim, within sixty days following the date of filing thereof, the claim shall be presumed to have been administratively disallowed, and the claimant shall be entitled to enforce his claim by court action."

Under date of December 21, 1953, the Federal Maritime Board, Maritime Administration, Department of Commerce revoked General Order 32 of the former War Shipping Administration. 18 Fed. Reg. 8730.

The regulations were replaced on April 7, 1955, by National Shipping Authority Order No. 67, 20 Fed. Reg. 2414, 1955 AMC 1134.

## **SPECIFICATION OF ERRORS ON JURISDICTION**

1. The District Court erred in overruling the exceptions of the United States to the libel.

2. The District Court erred in holding that it had jurisdiction to hear and determine this suit or that it had jurisdiction over the sovereign person of the United States.

3. The District Court erred in holding that the libel or the pretrial order stated facts sufficient to constitute a cause of suit against the United States.



## SUMMARY OF ARGUMENT

1. The United States only consented to be sued after a proper exhaustion of administrative remedies. Only eight days expired between the *mailing* of the claim and the filing of the libel and the claim cannot legally or factually be considered administratively disallowed. The court never acquired jurisdiction in this case and there was a complete failure of allegation and proof of facts sufficient to constitute a cause of suit against the United States.

## ARGUMENT

### I.

#### **The Court Did Not Have Jurisdiction and Farley Failed to Allege or Prove a Cause of Suit.**

A decree has been entered in this case against the United States when it clearly appears that Congress has specifically prohibited such suits under the circumstances which are disclosed by this record. The Clarification Act as re-enacted by the 1951 Act requires a seaman-employee to obtain an administrative disallowance of his claim as a necessary condition precedent to the filing of a suit against the United States.

There was a complete failure to satisfy the conditions imposed by Congress and the court never acquired jurisdiction and Farley never obtained a cause of action.

**A. Statutes Waiving Sovereign Immunity  
Are to Be Construed Strictly in  
Favor of the Government.**

The United States can only be sued in accordance with its consent and its liability is limited by whatever may be the bounds of its consent. *North Atlantic & Gulf SS Co. v. United States*, 209 F. (2d) 487, 489 (CA 2, 1954).

The sovereignty of the United States raises a presumption against its suability unless the conditions for suit prescribed by the statutory language are satisfied. *Schnell v. United States*, 166 F. (2d) 479, 481 (CA 2, 1948), cert. denied 334 U.S. 833. Courts are confined to the letter of the statute which expresses or limits the consent to be sued. *Defense Supplies Corp. v. United States Lines Co.*, 148 F. (2d) 311 (CA 2, 1945), cert. denied 326 U.S. 746.

A proper exhaustion of administrative remedies is certainly a valid statutory requirement imposed by Congress. Even formal conditions are considered indispensable. As stated in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, 254 U.S. 141, 143 (1920):

“Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with.”

It is even necessary to mail an amended libel to the Attorney General where a libel in personam against the United States has been converted into a libel in rem. *Schnell v. United States*, supra. Likewise, the mail-

ing of summons and complaint to the Attorney General as provided in the Federal Rules of Civil Procedure is a mandatory requirement. *Messenger v. United States*, 231 F. (2d) 328 (CA 2, 1956).

The failure to request an investigation as required by statute was considered fatal to a cause of action in *Graham v. Panama Canal Company*, 139 F. Supp. 271 (D.C., C.Z., 1955). An appeal to the Commissioner of Internal Revenue prior to an action against the United States was held to be a necessary prerequisite in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, *supra*.

The courts cannot interpret these statutes so as to dispense with statutory conditions. Exceptions cannot be engrafted into legislation even in the so-called hardship cases. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Graham v. Panama Canal Company*, *supra*.

As stated in *Federal Crop Ins. Corp. v. Merrill*, *supra*.

"It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures." (332 U.S. at 383)

This is equally true in suits by seaman-employees against the United States. In *McMahon v. United States*, 342 U.S. 25 (1951), the Supreme Court followed a rule of strict construction even after pointing out that legislation for the benefit of seamen should be construed liberally in their favor.

The plain language of the Clarification Act as re-enacted by the 1951 Act required an administrative disallowance prior to the filing of suit against the United States. If there is any necessity to construe this legislation, it must be construed strictly in favor of the United States and against the libellant.

**B. Claim Must Be Filed and Disallowed Before Seaman Can Sue United States.**

The Clarification Act enlarged the rights of seamen and provided for a uniform and definite method of enforcing those rights against the United States. The statute specifically provided that "Any claim referred to in clause (2) [included claims for injuries and maintenance and cure] or (3) hereof shall, *if administratively disallowed* in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act. . . ." (Emphasis added.)

The statute further defined the term "administratively disallowed" as a denial of a written claim in accordance with rules or regulations prescribed by the War Shipping Administration.

Pursuant to the statute, the War Shipping Administration issued extensive rules and regulations which required that a claim be filed and that it be administratively disallowed before the commencement of an action against the United States. Under these regulations, it was absolutely necessary for the claim to be either expressly disallowed or, in the alternative, presumptively disallowed by the expiration of 60 days from the date of the filing of the claim. General Order 32 (Br. 7-8).



The statute and the regulations which were enacted pursuant thereto have been repeatedly construed by the federal courts. Suits which were prematurely filed were uniformly dismissed on the grounds that an action could not be commenced against the United States until an administrative claim had been filed and administratively disallowed. *Fox v. Alcoa SS Co.*, 143 F. (2d) 667 (CA 5, 1944), cert. denied 323 U.S. 788; *Rodinciuc v. United States*, 175 F. (2d) 479 (CA 3, 1949), cert. denied 338 U.S. 895; *Gregory v. United States*, 187 F. (2d) 101 (CA 2, 1951); *Militano v. United States*, 156 F. (2d) 599 (CA 2, 1946); *Kemp v. United States*, 1953 AMC 192 (D.C., E.D. Pa. 1952); *Riggens v. United States*, 87 F. Supp. 128 (N.D. Ohio E.D. 1949).

In *Fox v. Alcoa SS Co.*, supra, the court held that the United States could not have been sued at all except for the provisions of the Clarification Act and that the privilege of suing was given only after administrative disallowance of a written claim. The court further stated that this accords with the general policy of the United States.

The purpose of the statute was further construed in *Rodinciuc v. United States*, supra:

"There is no doubt that Congress intended, by the Clarification Act, to grant a broad right of recovery against the United States. The purpose is also clearly expressed, however, to channel the seaman's claim first to the Administrator and then, from his adverse action, to the courts. The seaman has two years from the time of his injury to start suit. Within that two-year period he must file a claim with the Administrator, and if it is disallowed, the seaman may sue." (175 F. (2d) at 481)

Under the terms of the Clarification Act, Farley's right of action did not arise unless and until he exhausted his administrative remedy. *McMahon v. United States*, 186 F. (2d) 227 (CA 3, 1950), affirmed 342 U.S. 25 (1951). This is more than a technical requirement of an administrative regulation. It involves the proper fulfillment of a statutory condition to bringing an action against the United States. *Danstrup v. The Richmond P. Hobson*, 112 F. Supp. 851 (E.D., N.Y. 1953).

This was certainly the view of this court when it decided *Thurston v. United States*, 179 F. (2d) 514 (CA 9, 1950). This court held "the 'claim' does not mature into the 'cause of action' until its disallowance." (179 F. (2d) at 516)

The War Shipping Administration was terminated as of September 1, 1946, and all functions and powers of the administration were transferred to the United States Maritime Commission. Section 202 of the Act of July 8, 1946, Ch. 543, Title II, 60 Stat. 501. Thereafter there were other reorganizations and transfers.

*Danstrup v. The Richmond P. Hobson*, supra, discusses the history of the agencies entrusted with the duty of handling seamen's claims against the United States. The court in that case held that the history of these agencies showed a uniform attempt to conform to the express purpose of the Clarification Act.

If there was any doubt as to the length of time that the provisions of the Clarification Act survived the demise of the War Shipping Administration, this was completely removed by the passage of the 1951 Act. This

act specifically incorporated the provisions of the Clarification Act which required an administrative disallowance.

The passage of the 1951 Act eliminated any problems or confusion with respect to seamen's claims which may have been presented by cases such as *Handley v. United States*, 127 F. Supp. 539 (S.D. N.Y. 1954), and *Burton v. United States*, 109 F. Supp. 139 (S.D. N.Y. 1952).

Both of these cases failed to interpret or give proper effect to the 1951 Act. In addition, the *Burton* case applied only to seamen whose rights were extended by the amendment of 46 U.S.C.A. 745 which granted an extension of the statute of limitations to December 13, 1951.

Recent decisions have properly held that the court has no jurisdiction in the absence of allegation and proof that a claim has been administratively disallowed. *Thomas v. United States*, 127 F. Supp. 48 (E.D. Pa. 1954); *Sofie v. United States*, 1956 AMC 1459 (D.C. W.D. Wash. N.D. 1956); *Kinman v. United States*, 139 F. Supp. 925 (N.D. Cal. S.D. 1956).

*Thomas v. United States*, supra, was quite similar to the present case in that the claim was filed on February 12, 1954, and the suit was filed on February 23, 1954. The court gave proper effect to the 1951 Act and held that the suit could not be maintained because there had been no actual or presumptive disallowance of the claim.

The 1951 Act was in force during 1952. Farley sustained an injury in 1952 and filed his libel in 1954.

Regardless of any possible confusion as to the continuing effect of the Clarification Act, this 1951 Act specifically re-enacted into law the requirement of administrative disallowance.

This was a condition solemnly imposed by Congress and Farley was prohibited from bringing suit until he had obtained an administrative disallowance of his claim.

**C. 60 Days Must Expire Before Claim  
Deemed Presumptively Disallowed.**

The libel, which was filed on April 2, 1954, alleged that a claim was mailed on March 25, 1954, and that it had not been accepted or rejected and was deemed administratively disallowed. Only eight days expired between the mailing of the claim and the filing of this suit.

Farley made no attempt whatsoever to prove his allegation that the claim had been administratively disallowed. The allegations of the libel and the evidence clearly show that there was, in fact, no presumptive disallowance of this claim.

The Clarification Act as re-enacted by the 1951 Act provided that the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the War Shipping Administration.

The War Shipping Administration provided for actual allowance and disallowance and further provided that if the claimant was not notified in writing of a determination of his claim within 60 days from the date



of the filing of the claim that it would be presumed to have been administratively disallowed. 46 C.F.R. 304.26 (Br. 8).

The regulations of the War Shipping Administration, including the provision providing for presumptive disallowance, were continued in effect from time to time by the various succeeding administrative agencies. See *Danstrup v. The Richmond P. Hobson*, 112 F. Supp. 851 (E.D. N.Y. 1953).

On December 21, 1953, which was after the passage of the 1951 Act, the Maritime Administration revoked General Order 32 of the former War Shipping Administration. 18 Fed. Reg. 8730. These regulations were replaced on April 7, 1955, by NSA Order No. 67, 20 Fed. Reg. 2414, 1955 AMC 1134.

It is clear that the revocation of General Order 32 by the Maritime Administration in 1953 did not dispense with the necessity of administrative disallowance of a claim. Congress required such disallowance in the 1951 Act and the Maritime Administration certainly could not repeal or revoke the requirements of the statute.

The 60-day rule of presumptive disallowance had been in continuous effect for more than eight years prior to the passage of the 1951 Act. Numerous decisions of the courts of the United States had interpreted the regulations of the War Shipping Administration at the time when Congress considered and passed this Act.

The rule seems to be well-established that the reenactment, in the same or substantially the same terms,

of a statute which has received a settled judicial construction amounts to a legislative adoption of such construction. *Heald v. District of Columbia*, 254 U.S. 20 (1920); *Annotation*, 65 L. Ed. 106.

The regulations were issued in accordance with the directions contained in the Clarification Act. For all practical purposes, these regulations became a part of the statute. Congress re-enacted the statute without any amendment or change and it must be assumed that the regulations were approved and adopted as a part of the re-enacting legislation.

It has long been held that the re-enactment by Congress without change of a statute which has previously received continued executive construction is the adoption by Congress of such construction. *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337 (1908); *Hassett v. Welch*, 303 U.S. 303 (1938). In addition, legislative approval of existing regulations by re-enactment of the statutory provision to which they appertain gives such regulations the force of law. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939); *Helvering v. Winmill*, 305 U.S. 79 (1938); *Boehm v. Commissioner of Internal Revenue*, 326 U.S. 287 (1945).

Moreover, when Congress re-enacted that portion of the Clarification Act which provided "When used in this subsection, the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration.", such regulations were

actually in existence and were expressly enacted into law as an integral part of the 1951 Act.

The 1951 Act can hardly be interpreted otherwise. Congress certainly required administrative disallowance and if there was no available procedure for presumptive disallowance between December 21, 1953 and April 7, 1955, then seamen were necessarily obligated to obtain an express disallowance before they could sue the United States.

The regulation provided for presumptive disallowance after the expiration of 60 days and it would be unreasonable to assume that Congress intended that any other length of time should be applied. This is a proper matter for regulation and it is not an unreasonable length of time. *Fox v. Alcoa SS Co.*, 143 F. (2d) 667 (CA 5, 1944), cert. denied 323 U.S. 788. Sixty days is the time allowed by Rule 12(a) of the Civil Rules of Procedure for the United States to file an answer and it is also the length of time allowed the government for appeal. 28 U.S.C.A. 2107.

Congress could hardly have intended that the alternative method of presumptive disallowance should be decided by what would constitute a reasonable length of time under the facts and circumstances which may be involved in each case. Such a hit-or-miss procedure is not in the interest of orderly administration of claims or litigation against the United States.

Even if it is necessary to determine what constitutes a reasonable length of time for presumptive administrative disallowance, it is clear in this case that a wholly

inadequate length of time expired between the filing of the claim and the filing of the libel. It would be fantastic to assume that eight days, including time required for transmission by mail, was a reasonable length of time for the government to investigate and consider the facts and circumstances which were involved in this case.

There has been a uniform policy by Congress since 1943 to have claims channeled and administered through the appropriate administrative agency before allowing suit against the government. This is a mandatory statutory requirement and it cannot be waived.

There is no evidence in this record which would indicate any reason or excuse for the failure of Farley to file a timely claim and to obtain a proper administrative disallowance. The court did not have any jurisdiction and the allegations and evidence fail to prove facts sufficient to constitute any cause of action against the United States.

## **STATEMENT OF FACTS ON THE MERITS**

On the night of April 5-6, 1952, the steamship "Augustin Daly" was at anchor in the harbor of Sasebo, Japan, having arrived there on April 2nd (Tr. 109). The vessel was equipped with a pilot ladder and an accommodation ladder, both in good condition (Tr. 564-5). Because of the deep draft, heavy load, tenderness of the ship and the discharge of long piling from the deck into rafts in the water, the accommodation ladder was not



used and the master and chief officer determined to use a pilot ladder (Tr. 515,558). The pilot ladder besides being used by the ship's crew was used by longshoremen, military, naval officials and others concerned with the cargo—by more than 75 men each day (Tr. 516). The vessel was lying in smooth water in a protected harbor.

Farley was at the time of the accident 58 years of age. He had gone to sea for more than 30 years and had held a second assistant engineer's license, issued by the United States, since 1928. He was at that time suffering no physical disability and was in full possession of his sight and hearing. On April 5th at about 6:00 P. M., Farley, together with other members of the crew, descended the pilot ladder from the boat deck or main deck of the vessel in the area of the midships house to a launch provided by the United States and proceeded ashore. Farley testified that while ashore he had probably 3 beers, made some purchases, saw other members of the crew and particularly the assistant cook, Malcolm Edward Potts, consuming intoxicating liquor, and shortly before midnight Farley went to the dock for return to the ship via the launch. Aside from the operator of the launch there were 10 to 15 men on board. The launch was variously estimated at from 25 to 40 feet long with a beam from 6 or 7 to 10 or 12 feet. A portion of the after part of the launch was covered and was provided with seats for the men. The launch reached the ship shortly before or after 1:00 A.M. on June 6th and was made fast to the side of the "Augustin Daly." The pilot ladder was adequately lighted by deck lights on the vessel and at least one flood light which directed its beam

on the ladder. Farley had been seated in the stern of the launch. He walked forward a distance estimated by him as about 10 feet and stood 4 or 5 feet from the foot of the ladder. He testified that he stood there talking to other members of the crew until his injury without looking to see who was ascending the pilot ladder or the manner of the ascent. He testified that the light was such that he could have seen a man ascending the ladder and whether the person was encumbered by packages had he looked (Tr. 400).

The pilot ladder was of the usual type with oval side pieces into which were fitted 2 wooden rungs for each step with ropes running around the edges of the side pieces and seized or fastened at the points where the ends of the side pieces came together. Because of the shape of the side pieces which rested against the side of the vessel, there was a handhold on each side where the ropes were seized. No attempt was made by Farley to show that the pilot ladder was improper in construction or defective in any way. No part of the ladder broke or carried away. No charge was made that the lighting conditions were not adequate.

The assistant cook Potts climbed the pilot ladder carrying a bottle of whiskey under his left arm and holding another bottle by the neck with his right hand. He was 28 years old, 5 feet 9 inches tall, and weighed about 160 pounds. He had engaged in athletics in school and after leaving school. The ladder was fastened to the pipe rail on the boat deck and led past the main deck. Potts fell from the ladder at the main deck level and could not

remember whether he had a leg over the rail or was standing on it. He did not know why he fell. He had been drinking intoxicating liquor ashore and testified that he was not absolutely sober. Potts apparently sustained no injuries in the fall, but he landed on Farley who was standing near the foot of the ladder.

Various members of the crew brought packages with them on the launch. After the accident, packages were hauled up with a heaving line (Tr. 632-3), the usual practice when the pilot ladder was used.

The vessel's articles (Res. Ex. 9) prohibited the bringing of grog (intoxicating liquor) aboard the vessel. All witnesses agreed that it was hazardous for a man to climb a pilot ladder with hands so encumbered. Robinson, business agent for the Marine Engineers at Portland, testified that it was a "damned dangerous way" to climb a ladder (Tr. 477). Robinson, who was qualified by Farley as an expert, further testified that a ship is a place where a man is expected to keep his eyes open (Tr. 481), that the second assistant engineer had the right to stop a crew member from doing a dangerous act (Tr. 493), that it is not safe to stand under a ladder while a man is ascending with both hands free (Tr. 494), and it is not safe to stand within 5 feet of the foot of the ladder (Tr. 495). The same witness testified (Tr. 496):

"I will say, regardless of what that ladder was there, we will say they were acting in accordance with the law, it doesn't state it must be one kind of a ladder or another, and they both have been used for years and years and years and hundreds or thousands of men have went up and down them, so I wouldn't attempt to say which is the safer or isn't the safer,

it is up to the Master of the ship and the company to decide what type of a ladder to put there for the men to come up and down."

With the exception of Farley's witness McRae, no witness testified that a pilot ladder was not a reasonably safe appliance for boarding and leaving a ship (Tr. 141). There was testimony of Captains Larsen and Hazelwood, shipmasters of many years' experience, that a pilot ladder is a proper and safe appliance (Tr. 333, 312).

### SUMMARY OF ARGUMENT

A vessel is not negligent in furnishing a pilot ladder in good condition. *The Manitoba*, 99 Fed. 780; *Field v. Waterman S.S. Corp.*, 140 F. (2d) 849; *Biles v. U.S.*, 1949 A.M.C. 875; *Van Dartel v. U.S.*, 1950 A.M.C. 572.

In an action under the Jones Act, proof of negligence on the part of the United States is essential to Farley's recovery. *Johnson v. U.S.A.*, 333 U.S. 46; *Atlantic Coast Line Rd. Co. v. Anderson*, 221 F. (2d) 548; *Ford v. United Fruit Co. and U.S.A.*, 171 F. (2d) 641; *Witt v. U.S.A.*, 82 Fed. Supp. 696; *Nunez v. U.S.A.*, 123 Fed. Supp. 256; *Seville v. U.S.A.*, 163 F. (2) 296.

The proximate cause of Farley's injuries was his negligence in standing at the foot of the pilot ladder. *Larsen v. Coastwise (Pacific Far East) Line*, 181 F. (2d) 6, cert. den., 340 U.S. 833; *Ford v. United Fruit Co. and U.S.A.*, 171 F. (2d) 641; *Seville v. U.S.A.* 163 F. (2d) 296; *Atlantic Coast Line Rd. Co. v. Anderson*, 221 F. (2d) 548.

Farley was the only licensed officer present at the



time of the accident. It was his duty to warn Potts against the danger of ascending the ladder with his hands encumbered, particularly after observing Potts drinking intoxicating liquor ashore. Farley's breach of duty bars any recovery. *Jensen v. U.S.*, 184 F. (2d) 72; *Walker v. Lykes Bros. S.S. Co.*, 193 F. (2d) 772; *Dixon v. U.S.*, 219 F. (2d) 10; *Mason v. Lynch Brothers Co.*, 131 Fed. Supp. 255; *Battice v. U.S.*, 79 Fed. Supp. 932; *Mullen v. Fitzsimmons & Connell Dredge & Tug Co.*, 191 F. (2d) 82, cert. den., 342 U.S. 888; *Mullen v. Fitzsimmons & Connell Dredge & Tug Co.*, 199 F. (2d) 557, cert. den., 344 U.S. 933.

Farley walked from a safe place to a place of danger at the foot of the pilot ladder, while Potts was ascending the ladder in a negligent manner. *Larsson v. Coastwise (Pacific Far East) Line*, 181 F. (2d) 6, cert. den., 340 U.S. 833; *Ford v. United Fruit Co. and U.S.A.*, 171 F. (2d) 641; *Seville v. U.S.A.*, 163 F. (2d) 296; *Atlantic Coast Line Rd. Co. v. Anderson*, 221 F. (2d) 548. Negligence is determined in the light of all facts he knew or ought, in the exercise of reasonable care, to have known. *Atlantic Coast Line Rd. v. Anderson*, 221 F. (2d) 548; *Rocco v. Leheigh Valley Rd. Co.*, 288 U.S. 275, 77 L. Ed. 743; *Isaacson v. Jones*, 216 F. (2d) 599; *Saindon et al, v. Lucero, Adm.*, 187 F. (2d) 345; *DeHoney v. Harding*, 300 Fed. 696; *Cleveland-Cliffs Iron Co. v. Metzner*, 150 F. (2d) 206; *U.S. Gypsum Co., Inc., v. Balfanz*, 193 F. (2d) 1; *Witt v. U.S.A.*, 82 Fed. Supp. 696. There is no duty to warn of known or obvious dangers and there is no negligence in failing to do so. *Atlantic Coast Rd. Co. v. Anderson*, 221 F. (2d) 548. The vessel was not unsea-

worthy because a pilot ladder, sound and properly constructed, was used. *Cookingham v. U.S.A.*, 194 F. (2d) 213. There is neither authority nor testimony in the record indicating that Potts was not equal in ability to any of the other men in climbing a pilot ladder.

## **ARGUMENT**

In an action under the Jones Act, a recovery can be based only on proof of negligence on the part of the shipowner. In *Johnson v. U.S.A.*, supra, Mr. Justice Douglas said:

“The Jones Act makes applicable to these suits the standard of liability of the Federal Employers Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. 51.”

And in a dissenting opinion in the last cited case, Mr. Justice Frankfurter said:

“But so long as Congress sees fit to have liability for injuries by railroad employees and seamen based solely on proof of fault, it is not for this court to torture and twist the law of negligence so as to make it in result a law not of liability for fault, but a law of liability for injuries.”

In *Atlantic Coast Line Rd. Co. v. Anderson*, supra, the Court of Appeals for the Fifth Circuit said:

“It is still the law that in a case of this kind proof of negligence on the part of defendant is essential \* \* \*. The basis of his liability is his negligence, not the fact that injuries occur. *Ellis v. Union Pacific Rd. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572.”

## Negligence of Farley Is Sole Cause

The evidence clearly established that Farley's injuries were caused in whole or in part by his negligence in standing within 4 or 5 feet of the foot of the ladder while a member of the crew, with hands encumbered, was ascending the ladder. This court has in two cases in which the facts were strikingly similar held that an injured seaman cannot recover from the vessel owner.

In *Larsson v. Coastwise (Pacific Far East) Line*, supra, a merchant seaman filed a libel in personam, as in the case at bar, seeking damages from the United States and Coastwise Line for injuries sustained while a member of the crew. Libelant asked for damages, maintenance and cure. He was employed as an oiler and was fully familiar with the operation of the vessel's steam winches. While oiling the winch, he sustained injuries when the winch was negligently thrown into operation by Chinese stevedores. The winch was equipped with a shut-off valve with which libelant was familiar, but before attempting to oil the winch libelant neglected to shut off the steam. This court said, 181 F. (2d), at page 9:

"\* \* \* being a man of experience must have known that by its use, his job of oiling the winch would be rendered absolutely safe."

This court added:

"There is no question that a shipowner is obliged to furnish a seaman a safe place to work and that this duty is non-delegable \* \* \*. The shipowner's responsibility to furnish a safe place continues through any hazard created by stevedores in loading the cargo and engaged by the owners for that purpose."

The District Court dismissed the libel for damages, but allowed maintenance and cure and this court, in affirming the District Court, said (181 F. (2d) at page 9):

“From a review of the record, it is our conclusion that the findings of the District Court that appellee owner was free from negligence are sustained by the evidence. Moreover, there was no evidence to sustain the claim that the ship was unseaworthy or that there was failure to supply a safe place for appellant to work so as to place any liability in respect of the winch operation upon the shipowner.”

It would be difficult to find a case more fully parallel to the case at bar than that last cited. Assuming in the case at bar that Potts was guilty of negligence in attempting to climb the ladder encumbered as he was and in falling from the ladder, his negligence is comparable to that of the stevedores who negligently threw the winch in operation while Larsson was oiling it. Larsson made his place of work unsafe by failing to shut off the steam. Farley made his place of work unsafe by standing where, not only the government's witnesses but several of his own witnesses testified that it was dangerous to stand. Farley had proceeded from a safe place at the stern of the launch 10 feet in the direction of the pilot ladder to a point within 4 or 5 feet from the ladder. Farley's expert Robinson testified (Tr. 495):

“Well, if he is 10 feet away from the ladder normally he has protected himself.”

Farley by his own testimony showed that he could have remained 15 feet from the foot of the ladder.

In *Ford v. United Fruit and U.S.A.*, supra, a member of the crew of a merchant vessel sat on the ship's rail



facing outward watching the loading operations. He was accidentally bumped by one of two seamen engaged in innocent horseplay in the passageway behind the railing and fell to the dock below. He brought his action under the Jones Act to recover damages for negligence and also claimed additional wages, maintenance and cure. The District Court denied a recovery on the ground that libelant's injuries were solely due to his placing himself in a dangerous and precarious position on the ship's rail which was likely to and did cause him to sustain personal injuries. The court found that there was no negligence or unseaworthiness on the part of respondents and this court sustained the District Court's dismissal of the libel.

In *Atlantic Coast Line v. Anderson*, supra, plaintiff's intestate was crushed between a chain and a rail car and was killed. Plaintiff asserted that her intestate's death was due to negligence of the engineer. After discussing the principles upon which liability under the Employers Liability Act is founded, the court said (221 F. (2d), at page 553):

"It was not a situation where facts were known to the engineer which were not known to Anderson. It was not a situation where Futch, not Anderson, was directing the operations. It took only a few steps for Anderson to place himself in a position of safety around the southwest corner of the car, but he continued his attempts to disconnect the chain and in that brief moment he was caught. How could Futch have known or believed that Anderson would not take himself out of harm's way? How could there be a legal duty to warn Anderson when the situation was perfectly obvious to Anderson and the fatality occurred in a few seconds? The law is

well settled that there is no duty to warn of known or obvious dangers and no negligence, therefore, in failing to do so. 65 C.J.S., Negligence, Sec. 89, Notice or Warning of Known or Obvious Dangers, page 599; 56 C.J.S., Master and Servant, Sec. 296, page 1057; *Foreman v. Texas & N.O.R. Co.*, 5 Cir., 205 F. 2d 79.

"We realize that in a Federal Employers' Liability case assumed risk is not a defense and that contributory negligence goes only to diminution of damages. This is not a case of contributory negligence or assumed risk but of sole negligence. In placing and keeping himself in a position of danger between the end of the box car and the chain attached to the front of the locomotive, Anderson was guilty of extreme negligence. While this would only diminish his damages if the defendant was also guilty of negligence, proof that it was is wholly lacking, and Anderson's negligence was, as matter of law, the sole proximate cause of the accident." Citing cases.

A judgment upon a verdict of the jury was reversed by the Court of Appeals.

Farley was a man of 30 years' experience on ship-board. He had been a licensed engineer since 1928. His negligence must be determined in the light of all the facts he knew or ought, in the exercise of reasonable care, to have known. *Rocco v. Leheigh Valley Rd. Co.*, supra.

In *Isaacson v. Jones*, supra decided by this court in 1954, libelant, a passenger on a speedboat, was thrown into the water while sitting on the gunwale. The operator who knew he was in that precarious position, executed a sharp turn without warning. Libelant, who was experienced in water skiing, was found negligent for as-

suming a dangerous position. The court said (216 F. (2d) at page 601):

“It seems inescapable that a man of his age and experience knew or should have known that sitting on the gunwale under those circumstances was dangerous in the extreme. The above recited facts in our opinion established, without question, that libelant did not exercise the ordinary care for his own safety which his knowledge and experience required; hence he was contributorily negligent.”

In *Cleveland-Cliffs Line Co. v. Metzner*, supra, the court said (150 F. (2d) at page 209):

“\* \* \* If one voluntarily places himself in or remains in a position which he knows, or by the exercise of ordinary care should know, is dangerous, he cannot recover for resulting injury unless such injury is due to the negligence of the other party after the peril of the party injured is discovered. *Ordinary prudence requires every person to use his faculties of hearing and sight for his own protection and to avoid places of danger* \* \* \*.” (Emphasis added.)

In *Witt v. U.S.A.*, supra, libelant was injured by striking his hip against an unhooked door through which ship's stores were being moved. The court said (82 Fed. Supp. at 698):

“This brings us to libelant Witt who looked through the door but did not see how far it was open, which is another way of saying that he did not use his eyes. It is not unreasonable to require men to do that who have them to use. In other words, the negligence was his, and his alone, not that of the ship, namely, his fellow servant.”

## Breach of Duty by Farley Bars Recovery

Farley can hardly contend that he was under no duty to prevent injury to a crew member aboard the vessel since the duty was imposed upon him by statute. 18 U.S.C.A. 2196 provides as follows:

“Whoever, being a master, *officer*, radio operator, seaman, apprentice or other person employed on any merchant vessel, by willful breach of duty, or by reason of drunkenness, does any act tending to the immediate loss or destruction of, or serious damage to, such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or, by willful breach of duty or *by neglect of duty* or by reason of drunkenness, refuses or *omits to do any lawful act proper and requisite to be done by him* for preserving such vessel from immediate loss, destruction, or serious damage, or *for preserving any person belonging to or on board of such ship from immediate danger to life or limb*, shall be imprisoned not more than one year.” (Emphasis added.)

Potts had been drinking intoxicating liquor shortly before the accident. Farley knew this. Had Farley looked he would have seen that Potts was climbing the ladder in an extremely negligent manner with one bottle of whiskey under one arm and the top or another bottle clutched in the other hand. Farley says he did not see this, but could have seen it had he looked (Tr. 398).

Had Potts been injured as the result of his negligence in climbing the ladder while the second assistant engineer stood by and said nothing, Potts might well have established fault on the part of the vessel owner because of Farley's failure to warn him. Since there is no duty, however, to warn against obvious dangers, the shipowner



might have escaped liability for injuries to Potts, but the statute required Farley "to do what was proper and requisite to be done for preserving any person belonging to or on board of such ship from immediate danger to life or limb."

Farley's expert Robinson, business agent for the Marine Engineers Union, testified as follows:

"Now, this fellow you are speaking of, Mr. Farley, isn't the aggressive type I will say, never was. He never butted in any disputes with the crew and he just was sort of a happy go lucky guy and had very little trouble.

"There is many of them that tend to give orders to everyone and butt in and boisterous and they would probably have done different than Farley did, but he is not the aggressive type and he just live and let live, I presume is what that was."

Robinson's analysis of Farley's character throws light upon both what Farley did at the time of the accident and testified to in this proceeding. Farley did not want to see or hear what was going on. In and about ships, where all of the witnesses agree, one must be alert to avoid injury, Farley closes his eyes to the dangers to which he, himself, is exposed and in the same manner attempts to avoid his obligation to warn Potts against his negligent conduct. He was the only licensed officer on the launch. Aside from the statutory duty imposed upon officers of vessels, there was ample evidence upon the trial to support a finding that all of the officers have a duty to prevent accidents and generally to see to the safety of the crew.

In *Jensen v. U.S.*, 184 F. (2d) 72, the vessel was held

responsible for the failure of the officers to protect a member of the crew from injury. The vessel was at anchor in the Philippine Islands and a fight started between two crew members while about thirty members of the crew and two ship's officers were returning to the vessel in the ship's launch. The ship's carpenter was carrying a bottle of whiskey, was drunk and quarrelsome and picked a quarrel with an oiler. He was restrained from attacking the oiler in the launch and one of the officers told the carpenter to wait until he got back to the ship. When they arrived at the ship the officers and crew members gathered around one of the hatches to watch the fight and libelant was injured as he attempted to take a knife from the carpenter. The court said that no officer gave any order to the carpenter or attempted to restrain him in any way and that under the circumstances they had no difficulty in concurring with the District Court's finding of liability. The court (Third Circuit) stated that the master and ship's officers were under a duty to see to the safety of the crew and that they failed in that duty.

If it be assumed that Farley was injured by the negligent acts of Potts and it was Farley's duty, arising out of his employment as a ship's officer, to warn Potts and to restrain him from ascending the ladder while encumbered as he was, Farley's injuries were caused by his failure to perform his obligation and duty. The leading case on the duties of masters, and probably other officers, is *Walker v. Lykes Bros. S.S. Co.*, supra. The opinion was written by Judge Learned Hand. A master had brought an action against a shipowner for injuries that

he sustained when he was struck by a steel filing cabinet drawer. The master testified that six of the eight catches were out of order and did not hold the drawers when the ship rolled. The trial court refused to direct a verdict for the defendant and gave certain instruction concerning negligence and contributory negligence. The Court of Appeals stated that it was customary to speak of contributory negligence as a failure by the injured party to discharge a duty owed toward the wrongdoer. The court stated that it was important to distinguish between such a duty which the law imposes upon the injured person and a duty which the injured person has consciously assumed as a term of his employment. The court held that the first type results in no more than reducing the amount of an employee's recovery, but the second type is a bar to any recovery. The court said that if the plaintiff failed to repair the catches although he was able to do so, his failure was not only contributory negligence in the first sense but also a breach of his duty to the defendant which barred his recovery absolutely. In reversing the judgment and ordering a new trial, the court stated (193 F. (2d) at 774):

"The theory apparently is that a momentary inattention to one's own safety—the kind of thing of which we are all guilty every day—should not be treated as so serious a fault as a breach of a duty assumed by the employee for the protection of others, although incidentally it is for his own benefit too."

The *Walker* case was further explained in *Dixon v. U.S.*, *supra*. In that case the chief mate brought an action to recover for injuries sustained as the result of a fall when the top rungs of a ladder gave way. At the time

of the accident the chief mate was inspecting the ladder after defective bottom rungs had been repaired by a contractor. It thus appeared that the chief mate was actually engaged in performing the duty which he owed to the vessel. The court referred to the Walker case and stated that it was not applicable as Dixon was not guilty of any breach of duty toward his employer. The court said that the Walker case and one other cited case were in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before the court; that those cases were only incidents of the firmly established rule that the employee cannot recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of his employer-employee relationship; and that the results in those cases turn not upon any question of proximate cause, assumption of risk or contributory negligence, but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer which in effect off-sets the employee's right to recover against the employer for failure to provide a safe place to work.

The Walker case was followed in *Mason v. Lynch Brothers Company*, 131 Fed. Supp. 255, which involved an action by the master of a tug to recover for injuries caused by a fall on a slippery deck. Although not definitely stated, the same principle was followed in *Battice v. U.S.*, supra. In the Battice case libelant was a chief steward in charge of the ice box. While taking inventory, a piece of loose ice fell and struck him. The court stated that libelant was responsible for the proper stowage of



the ice box; that his negligence was the proximate cause of the accident; that even had it been proven that a messman had violated his instructions, the fact would still remain that it was his duty to see to it that the ice box was at all times a safeplace in which to work. The court further held that if relevant it would find that the conduct of libelant in failing to take precautions for his own safety when he saw the condition of the box (as he should have) was contributory negligence as a matter of law.

In *Mullen v. Fitzsimmons & Connell Dredge & Dock Co.*, supra, a seaman sought to recover damages for negligence and for maintenance and cure. Plaintiff was an able-bodied seaman with 33 years' experience on the Great Lakes and was employed by defendant as a deckhand on a tug. Plaintiff's duties consisted of handling mooring lines, helping the fireman in dumping ashes from the boiler room, and in closing hatches when necessary to keep the tug from taking water in rough weather. On the day of the accident, the tug had proceeded out of a harbor into the lake. After passing the breakwater the tug ran into a heavy sea. A wave followed plaintiff as he stepped through the galley door and closed the door on his right hand. The court held that the injury was caused solely by plaintiff's failure to perform his known duty as a deckhand; that he did not shut the galley door when he saw that the tug was going out into the lake in a heavy sea, and that his injuries resulted from his own negligence.

The last cited case involved also a question as to maintenance and cure and the court remanded this part

of the case to a court of admiralty. Upon appeal (199 F. (2d) 557,, cert. den., 344 U.S. 933) the court held that plaintiff was not entitled to maintenance and cure because his injury resulted from his own wilful disobedience of order and failure to perform his known duties. The principle has been applied in cases involving the master, steward, seamen and deckhands. The rule should certainly be applicable to a licensed officer.

### **Ship Not Negligent for Failure to Warn Potts**

Farley contended that the ship had a duty to warn Potts against the danger of falling from a pilot ladder while climbing with his hands encumbered. The United States had to act through the master, officers or members of the crew. Farley, a licensed officer, being on the ground, disclaims the duty to warn Potts, but asserts that the shipowner had such an obligation.

There is, of course, no duty to warn against obvious dangers. Had Potts been warned that there was danger of falling if he had only one hand or the partial use of two hands while climbing the ladder, he could not have known any more than his common sense told him. Farley might just as well contend that the United States should have warned him against standing at the foot of the pilot ladder, particularly while a man is climbing the ladder in a negligent fashion. Farley asserts that Potts was negligent, but denies that he, himself, was negligent, although the situations are virtually analogous. Had Farley used his senses he would have known without receiving any warning that he was in a place of danger. It was Farley's duty to stop Potts in his negligent conduct. It

was Farley's duty in the exercise of ordinary care to stand clear of the ladder when anyone was climbing or descending. He not only violated his duty toward the United States in not preventing injury to Potts, but he disregarded his duty to exercise reasonable care for his own safety.

### **Ship Not Unseaworthy**

Farley goes one step farther in charging the vessel with unseaworthiness because of Potts' alleged inexperience. He contends that Potts should have received training and instruction in the climbing of a pilot ladder. But according to the evidence, with little dispute, both Farley with 30 years' experience and Potts with two months' experience were guilty of negligence, even gross negligence. Since Farley did not stand clear of the ladder it may be assumed that he at no time received instruction to stand clear of ladders. Nothing that the shipowner could have told or shown either Potts or Farley regarding their negligence and violation of duty could have added to the knowledge that they obtained from observation of the pilot ladder.

If it be assumed that the vessel was negligent because of Potts' attempt to climb the ladder or that the vessel was unseaworthy because of employing him, the question still remains as to what was the proximate cause of Farley's injuries. If Farley had been required to stand at the foot of the ladder while Potts was ascending, his injuries might in whole or in part be regarded as having resulted from the negligence or unseaworthiness of the vessel. In *Johnson v. U.S.*, supra, libelant was

required to stand under another crewman who was holding a heavy block. The crewman dropped the block on libelant's head. Obviously libelant's injuries were proximately caused by the crewman's negligence. Libelant was in his proper place of work and it was rendered unsafe by the negligence of his fellow-employee.

If we assume that negligence of Potts contributed to produce Farley's injuries, the latter's gross negligence and callous indifference for his own safety and that of Potts clearly contributed heavily toward his injuries. In this situation the damages which he suffered should be diminished in proportion to the negligence for which the United States is liable and the contributory negligence for which Farley is chargeable.

### **AMOUNT OF DAMAGES**

Farley, while sustaining serious injuries, has made a very substantial recovery. He was married and living with his wife. He did not produce her nor any neighbors or friends who might have known the extent of his ability to work. In September, 1953, he worked one night as a relief engineer. From that time until the trial in August, 1955, he made no further attempt to work at any gainful occupation. Farley owns and lives on a 3-acre tract upon which he has his home and five duplexes which are rented by the month. A large part of the property is planted with nut trees. He has a flock of chickens. He has been mowing his lawn which is about half an acre in extent. For more than a year before the trial, at first five times and later three times per week, he drove his car to Portland for physiotherapy treatment, a round



trip of 24 miles. He admitted cleaning the chicken house and removing the meat from nuts raised on his place. The doctors testified that he was capable of doing light work, such as work in a service station, clerking in a store, the work of a salesman, watchman, etc., and they estimated his disability at about 50 per cent. From this we definitely conclude that Farley had been performing and was capable of performing far more work than he admitted in his testimony. There was no testimony that anyone other than his wife and himself performed the maintenance work in connection with his properties. This job in the maintenance of his place made it unnecessary for him to seek other employment. Dr. Berg, Farley's witness, in answer to a question by the court (Tr. 293), testified that Farley's condition had become stationary within the three months preceding the trial. During that period he had been capable of light work and had sought none.

Since 1952 there had been a great reduction in the jobs available for American seamen. Morgan, chief officer of the "Augustin Daly" at the time of the accident was at the time of taking his disposition (February 10, 1955) serving as an able seaman. He was a man 49 years of age and held a master's license. He testified that shipping was slack (Tr. 502-3).

After the Marine Hospital terminated medical treatment, Farley incurred expenses in the amount of \$1285.45 which we admit to have been reasonable and necessary. The United States denies responsibility therefore, because of Farley's failure to comply with the statute permitting suit against the United States and be-

cause his injuries were the result of his failure to perform a duty which he owed the shipowner.

Farley was at the time of trial 61 years of age. While there are older men serving as marine engineers, the testimony indicated that they were usually chief engineers and Farley holds only a second assistant's license. His failure to qualify for a higher rating in about 30 years as a second assistant would justify the conclusion that he would not qualify thereafter. It would seem reasonable to conclude that Farley might anticipate some employment as a marine engineer until the age of 65 years. At that age he would qualify for his Social Security pension. His work expectancy could, therefore, not be said to exceed 7 years. The District Judge saw the libellant during the several days of the trial and heard the medical witnesses who testified regarding Farley's injuries. Based upon the observation of the witnesses and the weight which the court felt should be given to the testimony bearing upon Farley's injuries, the court found that he was entitled to an award of \$8,000. The judge was in an excellent position to gauge and estimate the seriousness of Farley's injuries and the extent of his pecuniary loss. His findings on the amount of damages should not be disturbed.

The court awarded Farley maintenance at the rate of \$8.00 per day for a period of nearly two years, totaling \$5,816. In addition, Farley was awarded expenses of medical treatment in the amount of \$1,357. The United States does not question the propriety of these amounts, assuming that the court had jurisdiction to make any award and that Farley's claim was not barred because of his neglect of his duty.

## CONCLUSION

Appellee-appellant believes that Farley failed in his libel and in his proof to bring himself within the terms of the statute which permits suit against the United States. The terms upon which suit can be brought against the United States were determined by the Congress and cannot be enlarged upon by the courts. His suit should, therefore, be dismissed.

Appellee-appellant believes that the evidence established that Farley sustained his injuries by reason of his own breach of duty in failing to prevent Potts from climbing the ladder in a negligent manner. To award Farley damages for injuries resulting from his own breach of duty necessarily makes the United States, as shipowner, an insurer against losses occasioned by injury. If this court holds that the District Court had jurisdiction, the suit should nevertheless be dismissed because the injuries were not occasioned by negligence on the part of the shipowner or unseaworthiness on the part of the ship.

Respectfully submitted,

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

JOHN FARLEY,  
Appellant,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

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**ANSWER AND REPLY BRIEF**  
**of**  
**Appellant-Appellee John Farley**

---

Appeal from the United States District Court  
for the District of Oregon.  
Honorable William G. East, Judge.

---

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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JOHN FARLEY,

Appellant,

vs.

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Appellee.

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**ANSWER AND REPLY BRIEF**  
**of**  
**Appellant-Appellee John Farley**

---

Appeal from the United States District Court  
for the District of Oregon.

Honorable William G. East, Judge.

---

**INTRODUCTORY**

This brief combines the answer of John Farley to the brief for appellee-appellant, United States of America, and the reply brief of John Farley upon his appeal. Because of the confusion in nomenclature engendered by the cross appeal, we shall refer to the parties as libellant and respondent. In its opening brief, respondent, United States of America, has argued its appeal

upon an issue which it terms jurisdictional, and upon the merits of the case. We shall answer these contentions under the heading "Jurisdiction" and "Merits of the Case."

We shall thereafter reply to the Answer of the Respondent upon the issue of damages, which is the sole basis of the appeal of libellant Farley.

## **STATEMENT OF FACTS ON JURISDICTION**

Libellant, while employed aboard the S. S. AUGUSTIN DALY, a vessel owned and operated by the United States, was seriously injured in the port of Sasebo, Japan, on April 6, 1952. On March 25, 1954, approximately twelve days before the two-year statute of limitations provided by the Suits in Admiralty Act would have run, Farley mailed a formal notice of claim to the General Agent of the vessel and also to the U. S. Maritime Administration (Tr. 16; Lib. Ex. 4, Tr. 455).

On April 2, 1954, approximately four days short of the expiration of two years following his injury, Farley filed his libel herein. On the day following the filing of the libel, counsel for Farley notified counsel for the respondent by letter that an extension of time for sixty days from and after March 25, 1954, was given the respondent within which to answer or otherwise appear (Tr. 458; Lib. Ex. 8).

No request was made to the Court by respondent for a stay in the proceedings or for additional time within which to answer or appear. On the contrary, re-

spondent, United States, filed its Exceptions to the libel on April 22, 1954 (Tr. 8), approximately two weeks after the statute of limitations would appear to preclude refiling.

Respondent's exceptions to the libel were presented to U. S. District Judge Claude McColloch for consideration upon argument and memorandum briefs. Judge McColloch overruled the exceptions (Tr. 11). The case did not come on for trial until July 27, 1955, approximately one year and three months later (Tr. 38).

After the overruling of its exceptions to the libel, respondent, United States, continued to assert the same defense in its Answer and in the pretrial order. The issue was again resolved adversely to respondent by the trial judge, Hon. William G. East, in his conclusions of law dated March 23, 1956 (Tr. 41).

Stated briefly, the objections raised by the respondent involved the following issues:

(1) Whether there was any requirement of filing notice of claim and administrative disallowance thereof applicable to this libel.

(2) Whether, if such requirement existed, administrative disallowance of claim is a condition precedent to filing the libel, or is merely a bar to jurisdictional enforcement thereof.

(3) Whether, assuming notice of claim and administrative disallowance thereof was a condition precedent to filing the libel, prematurity of filing was cured before final determination of the cause.

## SUMMARY OF ARGUMENT ON JURISDICTION

(1) There was no legal requirement for notice of claim and administrative disallowance when the libel was filed.

(2) If notice of claim and administrative disallowance were required, such was not a condition precedent to filing the libel.

(3) If the libel was prematurely filed, the cause of action matured before final determination of the case on the merits.

## ARGUMENT

### (1) No Requirement for Notice of Claim and Administrative Disallowance Existed When Libel Was Filed

By the Suits in Admiralty Act (Title 46 USCA, Secs. 742-745, 1920) the United States consented to be sued by libel in personam in maritime tort cases involving government ownership or operation of merchant vessels. *Johnson v. United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320, 50 Sup. Ct. 118, 74 L. Ed. 451 (1929); *Desrochers v. U. S.*, 105 F.2d 919 (2 Cir. 1939). Under this act recovery may be predicated on unseaworthiness or negligence. The standards of care required of marine employers by the Jones Act (which incorporates the Federal Employers Liability Act) are applicable to the Suits in Admiralty Act. Prior to the Clarification Act of March 24, 1943 (50 USCA App. 1291, 57 Stat. 45), a seaman injured aboard a govern-



ment-owned or operated merchant vessel was not required to pursue any administrative remedies before filing his libel.

Upon the requisition of the merchant fleet in time of war, thousands of seamen became employed by the United States through the War Shipping Administration. The Clarification Act, inter alia, prescribed the conditions of employment for this wartime influx of maritime government employees. In the legislation as enacted, seamen were specifically denied the benefits of the U. S. Employees Compensation Act, the Civil Service Retirement Act, and other remedial federal legislation, for the following reason set forth in the act:

“Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of . . .” (The federal employees acts previously set forth).

As to seamen's claims for injuries, maintenance and cure, wages, etc., the Clarification Act provides that such claims, if administratively disallowed, shall be enforced pursuant to the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of said Act. The Clarification Act also provides that administrative disallowance shall be in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration.

As is stated in the case of *Manderscheid v. U. S.*, 88 F.Supp. 232 (N.D. Cal. S.D. 1950):

"The Clarification Act extended the right to sue (note: then existing under the Suits in Admiralty Act) to seamen aboard government ships employed as public vessels. But to prevent the flood of war-time litigation which the hazards of war-time operations made imminent, an administrative disallowance of claims of seamen employed on both classes of vessels was made a prerequisite to enforcement under the Suits in Admiralty Act."

It is thus seen that the Clarification Act is not a statute waiving sovereign immunity from suit except as to those cases where the seaman was not employed aboard a merchant vessel. As to merchant vessels owned or operated by the United States, the government had given its consent to be sued some 23 years earlier, and thus the Clarification Act cannot be correctly described as a statute waiving sovereign immunity. On the contrary, as to government-operated merchant vessels (which is the type involved in the instant case) the Clarification Act is a legislative attempt to attach certain conditions in limitation of a cause of action already in existence. As such, the legislation should be construed strictly against the sovereign and in favor of the class of persons intended to be benefited by the earlier remedial legislation.

Pursuant to the Clarification Act, the Administrator, War Shipping Administration, promulgated certain rules and regulations requiring notice of claim to be given, and administrative disallowance thereof, prior to enforcement of claims by court action (General Order 32, April 22, 1943, 8 Fed. Reg. 5414). These regulations required a notice of claim to be filed with the General Agent for the vessel involved, and the claim was pre-

sumed to be administratively disallowed 60 days thereafter, if neither allowed or disallowed in the interim.

The War Shipping Administration ceased to exist on September 1, 1946, and on the same date its successor agency, The Maritime Commission, ordered all of the orders and regulations of its predecessor agency continued in effect (46 CFR 687. Head note to Subchapter G).

As is stated in the case of *Burton v. United States*, 109 F.Supp. 139, 142 S.D. N.Y. 1952):

"When the Maritime Commission took over the functions, powers and duties of the no longer existing Administration on September 1, 1946, it did so to liquidate the Administration's affairs by December 31, 1946. It merely stood in the Administration's shoes. The Commission so treated its functions in this regard as temporary, as to deliberately neglect to amend the Administration's regulations by substituting its own name therein. If the requirement for the administrative disallowance of a claim under the Clarification Act and the Administration's Regulations at all survived the demise of the Administration on August 31, 1946, it, at most, prevailed only until two years thereafter. . . .

"It is also significant that in the first regulations adopted by the Federal Maritime Board, as successor to the Maritime Commission under Reorganization Plan No. 21 of 1950, 'Subchapter G—Emergency Operations' was omitted. This omission may be regarded as administrative recognition of the obsolescence of its provisions, including those upon which respondent here relies."

The Clarification Act applied only for the duration of the war and six months thereafter. (Benedict on Admiralty, 6th Ed., Vol. 1, Pocket Supplement, p. 152.)

On June 2, 1951, Public Law 45, Chapter 121, 82nd Congress, 2d Sec. 65 Stat. 59 was passed, entitled "Third Supplemental Appropriations Act, 1951." The body of this statute commences as follows:

"The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply supplemental appropriations for the fiscal year ending June 30, 1951, and for other purposes, namely:"

Thereafter follow approximately sixty separate appropriations to various governmental agencies, including the House of Representatives Stationery Revolving Fund, and the Department of Commerce Vessel Operations Revolving Fund. The entire statute is concerned with appropriations and fiscal policy associated therewith.

The quoted excerpt from the statute which appears on page 6 of the United States' brief is misleading when removed from context. Placed back in context, it is clearly seen that the language is designed solely to prevent such seamen, employed through general agents on government owned or operated vessels (and thus technically United States government employees) from achieving full status as government employees for purposes of the U. S. Employees Compensation Act, the Civil Service Retirement Act, and other kindred government employee benefits.

Further reasons clearly indicate that the 3rd Supplemental Appropriations Act, 1951, neither re-enacted nor revived the then defunct Clarification Act. The Clarification Act was set forth in that portion of Title 50,



USCA Appendix entitled "Emergency and War Shipping Acts." The body of the Clarification Act makes repeated references to war activities and the War Shipping Administration. The notice of claim provisions relate exclusively to rules and regulations prescribed by the War Shipping Administration. If Congress intended to revive the notice of claim provisions of the Clarification Act, it would certainly not have done so by naming a governmental agency then five years deceased to administer its provisions. The answer is inescapable that Congress, in 1951, incorporated certain portions of the Clarification Act merely as an implementation to its fiscal policy expressed in an appropriation measure. That the 1951 Supplemental Appropriations Act was not an express or implied revivor of the Clarification Act is thus shown by statutory history and careful analysis.

Various cases have been decided since 1951 which discussed the notice of claim provisions of the Clarification Act. Only one of these cases, *Thomas v. U. S.*, 127 F.Supp. 48, even briefly mentions the 1951 act relied on by respondent.

Respondent makes the astounding contention that the 1957 Supplemental Appropriations Act not only revives the Clarification Act, but also incorporates by reference the administrative rules and regulations of the long defunct War Shipping Administration, relating to notice of claim and administrative disallowance. This contention is wholly unsupported by authorities. The cases cited by respondent on page 18 of its brief involve only a familiar principle of statutory construction which

is expressed in 42 Am. Jur. of Public Administrative Law, Sec. 83, p. 409, as follows:

“Nevertheless, the rule that re-enactment of the language of the statute is an adoption of a previous administrative construction is nothing more than an aid in statutory construction, and while useful at times in resolving ambiguities, does not mean that the prior construction has become so imbedded in the law that only the legislature can effect a change.”

If any lingering doubts persisted respecting the existence of General Order 32 (WSA Regulations re notice of claim and administrative disallowance), such were dispelled by the specific revocation thereof by the Maritime Commission on December 21, 1953. 18 Fed. Reg. 8730. This action destroyed with certainty and finality the entire basis for respondent's objections to jurisdiction herein. At the date of filing this libel, April 2, 1954, there were no rules or regulations of any kind or character requiring notice of claim to be filed and administrative disallowance thereof. There was no governmental agency with which such a notice could be filed, or which could receive, process, allow or disallow such a claim.

The power of an administrative agency to establish rules and regulations necessarily implies the power to modify, repeal or create anew. *U. S. v. Eliason*, 16 Pet. (U.S.) 291, 10 L. Ed. 968.

The decision of the Maritime Commission to abolish the regulations was undoubtedly prompted by a recognition of the statutory, administrative and practical obsolescence of General Order 32, and a desire to clarify

the law and avoid results of conflicting court decisions. The cases of *Danstrup v. The Richard P. Hobson*, 112 F. Supp. 851, and *Burton v. U. S.*, 109 F. Supp. 139, were decided within the year immediately preceding the specific revocation of General Order 32. The cases reached opposite conclusions relative to the continued existence of General Order 32. In the wake of these decisions, the abolition of General Order 32 was thus deliberate, intentional and final.

On April 7, 1955, the National Shipping Authority promulgated new regulations which include similar provisions to those contained in former General Order 32.

During the period December 24, 1953 to April 7, 1955, it is clear that no rules, regulations or procedure existed for filing of notice of claim or obtaining its disallowance.

Only one case is found which discusses the December, 1953 revocation of General Order 32; *Kinman v. U. S.*, 139 F. Supp. 925, cited in respondent's brief. This case concerns an extension of the two year Suits in Admiralty statute of limitations by 60 days. The Court observed that the notice of claim was filed and disallowed prior to revocation of General Order 32 on December 24, 1953. It follows that after December 24, 1953, and prior to April 7, 1955, notice of claim and administrative disallowance thereof were unnecessary prior to filing a libel.

The case of *Handley v. U. S.*, 127 F. Supp. 539 (S.D. N.Y., 1954) is one wherein the Court carefully considered the conflicting judicial viewpoints set forth in the

cases of *Burton v. U. S.*, supra, and *Danstrup v. The Richard P. Hobson*, supra. The Court followed the rule of the *Burton* case, and in rejecting the reasoning of the *Danstrup v. The Richard P. Hobson* case, stated:

“However pertinent the analysis is to the injury in 1944, it is, I feel, not pertinent to the injury in 1952. For injuries of such a date the administrative history does not disclose a ‘uniform attempt to conform to the expressed purpose of the Clarification Act’ in providing for the requirement of administrative disallowance of claims prior to resort to the Courts.”

The cases cited by respondent involving libels filed prior to December 24, 1953, have no relevance whatever to the instant controversy. None of the later decisions cited by respondent refer to the 1953 revocation of General Order 32 except the case of *Kinman v. U. S.*, supra.

## **(2) Notice of Claim and Administrative Disallowance, If Required, Are Not Conditions Precedent to Filing a Libel.**

As a precautionary measure, a proper notice of claim was filed herein on March 25, 1954. The libel was filed approximately eight days thereafter, and the trial of the case commenced over fifteen months later. Although we cannot conceive of any administrative disallowance of claim requirement after December 24, 1953, the case of *Manderscheid v. U. S.*, 88 F. Supp. 232 (N.D. Cal. S.D., 1950) holds that such requirement is not a condition precedent to filing the libel, but is only a temporary bar to its enforcement. The case involves the identical factual situation herein; i.e., the filing of notice of claim



and the filing of the libel thereafter, prior to actual or presumptive disallowance of the claim, in order to prevent the statute of limitations from running.

The following quotations are taken from this case:

"The United States contends that this Court has no jurisdiction to entertain the libel because it was commenced before the claim had been administratively disallowed either affirmatively or presumptively by the General Agent's failure to act within 60 days after receiving the claim."

"Neither logical reasoning nor Congressional intent support the assumption that administrative disallowance of seamen's claims must precede the *filing* of suit. There is not the slightest indication of any Congressional concern as to a sequential relationship between administrative decision and commencement of suit. What is indicated is that Congress wanted an adequate opportunity for administrative action before there could be judicial *enforcement* of the tendered claim."

"The basic purpose of the Clarification Act was to preserve the existing rights of seamen. As important as any of these rights was a two-year period in which to commence suits, under the Suits in Admiralty Act. Congress manifested no intention that this period should be shortened. Yet, the effect of the regulations requiring that, in the event of inaction on the part of the General Agent, 60 days must elapse after the claim is filed before suit can be commenced, is to reduce the two-year period by two months. Legislation intended to be a boon to seamen could thus be converted into a trap for the unwary."

"But the mere filing of suit to prevent the action from being barred by the two-year limitation provision of the Suits in Admiralty Act need not have the effect of depriving the administrative agency of the full time specified within which to make its

determination. If need be, the Court can stay the proceeding until the agency has had a full 60 days to study the claim. If, in the meantime, the claim is allowed, the suit can be dismissed; if the claim is disallowed, and no action is taken within the prescribed period, the suit can proceed."

"It is my opinion Congressional intent will best be effectuated by permitting this suit to proceed. Particularly is this so, if we give heed to the admonition that legislation for the protection of seamen must be liberally construed in their favor. *McInnis v. United States*, 9 Cir. 153 F.2d 387, and cases there cited."

The compelling logic of this decision should be determinative herein if any disallowance of claim provisions were operative after December 24, 1953.

### **(3) If Libel Was Prematurely Filed the Cause of Action Matured Before Final Determination of the Case.**

Even assuming that administrative disallowance of claim was a condition precedent to the filing of the libel, it should not be dismissed for prematurity.

Where threat of permanent foreclosure of judicial review of administrative determination by Suits in Admiralty statute of limitations is imminent, the injured party should be permitted at least to file, if not to prosecute his libel in Court. *Atlantic Carriers, Inc., v. United States*, 121 F. Supp. 5.

It is not the practice in Admiralty to dismiss a libel because prematurely filed, if the right has accrued afterward, and before the matter is presented for final de-

termination. *Munson SS Line v. Glasgow Nav. Co.*, 235 F. 64; *The Pioneer*, 53 F. 279; *Moran Towing and Transportation Co. v. U. S.*, 56 F. Supp. 106; *Skibs, et al v. Cursetjee and Sons, Ltd.*, 133 F. Supp. 467 (N.Y. D.C. 1955).

The rule of strict construction of the language of statutes waiving sovereign immunity is not applicable to the Suits in Admiralty Act, the liberal provisions of which should not be interpreted in a restricted sense. *Nahmeh v. U. S.*, 267 U.S. 122, 125, 45 S. Ct. 277, 69 L. Ed. 536.

In discussing the Clarification Act, this Court stated in the case of *McInnis v. U. S.*, 152 F.2d 387 (9 Cir. 1945):

“Such legislation concerning seamen’s injuries and maintenance and cure has always been construed with extreme liberality in their favor. *Jamison v. Encarnacion*, 281 U.S. 635, 640, 50 S. Ct. 440, 74, L. Ed. 1082; *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 729, 63 S. Ct. 930, 87 L. Ed. 1107; *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368.

It follows that the lower court’s rulings on respondent’s objections to jurisdiction should be sustained.

## STATEMENT OF FACTS ON THE MERITS

The purported statement of facts appearing on pages 20 to 24 of respondent's brief represents nothing more than a slanted and argumentative presentation of matters deemed favorable to the vessel owner.

The "SS AUGUSTIN DALY" anchored in the harbor of Sasebo, Japan, on the morning of April 2, 1952, and remained there until the day of Farley's injury, April 6, 1952. Although the crew was given shore liberty during the five days of the vessel's stay in Sasebo, the only device provided for ingress and egress from the vessel was a pilot ladder. The ship was equipped with an accommodation ladder which was not rigged for use at Sasebo.

An accommodation ladder is a rigid series of steps made in one or two sections, and is provided with hand-rails. The upper end of the accommodation ladder is bolted to a platform which folds out from the main deck of the vessel in a horizontal position. The ladder extends down diagonally and parallel to the side of the vessel, and the lower end is supported by a chain which is fastened to a block and pawl from one of the ship's davit's (Tr. 58, 513).

A pilot ladder is a flexible rope ladder with wooden crosspieces for steps, which is fastened on the deck and hangs down over the side of the vessel to the water line. The bottom of the ladder is not secured (Tr. 511).

Prior to the time of libellant's injury, all discharge of cargo had been completed, and the vessel was no



longer tender (Tr. 588). The draft of the vessel was not such as to render the use of the accommodation ladder impractical (Tr. 94-97, 607). Three witnesses testified that the accommodation ladder is the customary device employed for a vessel at anchor when shore liberty for the crew is granted, and a pilot ladder is not a safe device for that purpose (Tr. 65, 141, 391).

The pilot ladder was affixed to the pipe rail on the boat deck of the vessel (Tr. 511, 566). It was known that the majority of the crew in ascending the ladder would get off at the main deck level where their quarters are located (Tr. 524, 593). It is considerably more difficult to get off the pilot ladder at the main deck level when the ladder does not terminate there, but continues up to the boat deck level (Tr. 156, 157, 177, 593).

There was no platform provided for seamen to alight from the pilot ladder at the main deck level. The pilot ladder was not rigged next to the horizontal platform which folds out from the side of the ship from the main deck of the vessel.

Farley went on shore liberty at approximately 6 p.m. on April 5, 1952, in a liberty launch chartered by the representative of the vessel owner. While ashore Farley saw other members of the crew, including assistant cook, Malcolm Edward Potts, sitting at a table with beverages in front of them (Tr. 260). Farley returned to the liberty launch which left the dock shortly after midnight on April 6, 1952 (Tr. 114). Approximately twelve to fifteen crewmen from the "SS AUGUSTIN DALY" were returning to the vessel in the liberty launch, including

Farley and assistant cook, Malcolm Edward Potts (Tr. 114, 245). The voyage back to the vessel was uneventful and there was no boisterous or drunken activity (Tr. 117, 641, 642). The liberty launch pulled alongside the "SS AUGUSTIN DALY" at the point where the pilot ladder hung down.

The returning crewmen got up from their seats and started forward to the bow of the launch where the pilot ladder was situated. There was no crewman on duty on the deck of the vessel supervising the return of the liberty party up the pilot ladder.

One of the returning crewmen climbed the pilot ladder. The second crewman up the ladder was assistant cook, Malcolm Edward Potts (Tr. 415), who was on his first voyage. Potts had never previously ascended a pilot ladder and had received no instructions from the master or other crewmen of the "SS AUGUSTIN DALY" as to the proper manner of ascent (Tr. 421). Potts ascended the pilot ladder with one bottle under his left arm and another bottle in his right hand (Tr. 417). While Potts was attempting to get off the ladder at the main deck level, he fell over backwards, a distance of approximately 19 feet, and landed on three men who were standing on the deck of the liberty launch waiting to board (Tr. 122). There was no warning sounded prior to Potts' fall (Tr. 120). Farley was standing approximately five feet from the ladder when struck, and one of the other crewmen who was struck was standing closer to the ladder (Tr. 257). Potts, who was uninjured by the fall, then retrieved one of the two bottles which he was carrying, and proceeded up the Jacob's ladder (Tr. 419).

Farley was talking to a fellow crewman when struck, and did not observe Potts' manner of ascending the ladder. Farley, in thirty years at sea, had never seen a pilot ladder used for shore liberty (Tr. 392-393) and had never seen a seaman fall from a ladder (Tr. 254).

## SUMMARY OF ARGUMENT

- (1) Potts' negligence was proximate cause of accident.
- (2) Potts was acting within scope of employment.
- (3) Ship was negligent in not providing safe method of ingress.
- (4) Farley was not negligent.
- (5) Ship was unseaworthy.
- (6) Findings of trial court, supported by substantial evidence, should not be disturbed .

### **(1) Potts' Negligence Was Proximate Cause of Accident.**

The trial court found that the proximate cause of Farley's injuries was the negligence of respondent's agent, Potts, in ascending the pilot ladder with hands encumbered (Tr. 39). The testimony was unanimous that it is extremely hazardous to climb a pilot ladder in the manner selected by the inexperienced crewman, Potts, and respondent has not contended to the contrary. In view of the overwhelming evidence on this specification of negligence, it became unnecessary for the trial court to decide whether respondent was negligent, or the vessel unseaworthy in the other particulars alleged.

Potts fell while attempting to climb over the main deck rail (Tr. 418, 440). He was unable to state any particular cause of this fall except to say that the encumbrance of the bottles may have made his movements "a little awkward" (Tr. 417). The findings of the trial court as to the proximate cause of Pott's fall were thus amply supported by the evidence.

## **(2) Potts Was Acting Within Scope of Employment.**

Although this issue is included in respondent's statement of Points on Appeal (Tr. 653), it has not been argued in the lower court or in respondent's brief. This is perhaps because the issue has been clearly settled adversely to respondent by such cases as: *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36, 87 L. Ed. 596; *Marceau v. Great Lakes Transit Corp.*, 146 F.2d 416 (2 Cir. 1945); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 87 L. Ed. 1107; *Warren v. U. S. A.*, 340 U.S. 523, 95 L. Ed. 503; *McDonough v. Buckeye Steamship Co.*, 103 F. Supp. 473, Affd. 203 F.2d, 558 (6 Cir., 1951); Cert. Den., 97 L. Ed. 1357; *Kyriakos v. Goulandris Bros. S. S. Co.*, 151 F.2d 132 (2 Cir., 1945); *Adams v. American President Lines*, 146 P.2d 1, 1944 A.M.C. 550; *Wong Bar v. Suburban Petroleum Transport Co.*, 119 F.2d 745 (2 Cir., 1941).

The last above cited case of *Wong Bar v. Suburban Petroleum Transport Co.*, involves a close factual parallel with the instant case. The alleged negligence of the fellow crewman occurred when he and the injured libel-



lant were both off duty and were leaving the vessel. The Court held that both crewmen were acting "in the course of their employment" while leaving the vessel, and thus the deckhand's negligence in assisting the cook in leaving the tugboat was imputable to its owner.

In the instant case, both Potts and Farley were returning to the vessel from authorized shore leave. As was stated by the U. S. Supreme Court in the case of *Aguilar v. Standard Oil Co.*, supra:

"In short, shore leave is an elementary necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."

That an act is in violation of ship's regulations does not render it beyond the scope of employment. If the rule were otherwise, an employer might evade liability for his servant's torts by instructing them to refrain from negligent conduct. As is stated in the case of *Adams v. American President Lines*, supra:

"It is contended that the act of throwing the (orange) peel on the deck was contrary to regulations and in disobedience of orders. If that was so, the fact does not change the character of the act as one within the scope of the employment. The rule is that an employer is liable for the acts of his employees within the scope of the employment notwithstanding they are done in violation of rules, orders or instructions. (*Ruppe v. City of Los Angeles*, 186 Cal. 400, 199 P. 496; *Johnson v. Monson*, 183 Cal. 149, 190 P. 635; 35 Am. Jur. p. 993, Sec. 559.)"

The negligence of Malcolm Edward Potts while returning to his employment aboard respondent's vessel is thus clearly imputable to the ship owner.

### (3) Ship Negligent in Not Providing Safe Ingress.

On page 24 of its brief respondent cites four cases for the proposition that a vessel is not negligent in furnishing a pilot ladder in good condition. All of the cases are distinguishable in that they involve sole negligence of the plaintiff in falling from a ladder.

Libellant does not contend that a pilot ladder is an unsafe appliance under all circumstances. When only a few members of the ship's crew are using the ladder during duty hours (e.g., when going ashore for ship's business), or when a limited number of outside personnel must board the ship (e.g., pilots, immigration, health and other inspectors), the device is perhaps not unreasonably unsafe. Likewise, when the vessel's deck crew is required to do painting on the ship's side, the use of a pilot ladder to lower these men to stagings may be the only method whereby the stagings on said portions of the vessel could be reached.

However, all of the above circumstances have three things in common (Tr. 141, 142):

- (1) The ladder is being used during duty hours for specific ship's business.
- (2) The ladder is being used only by certain members of the ship's crew and other persons who, by their special duties, have become experienced in its use.
- (3) It would be inefficient and perhaps impracticable to rig an accommodation ladder for each isolated boarding required by the above.

None of these considerations apply to a ship which is at anchor in smooth water for five days during which

time shore leave is to be given the entire crew. Use of the pilot ladder for shore liberty involves the following additional hazards:

- (1) Various members of the crew (e.g. steward's department) are not experienced in the use of pilot ladders.
- (2) Various members of the crew return to the vessel from shore liberty in an exuberant state (Tr. 608).
- (3) Various crew members return to the ship carrying foreign purchases.

The hazards are further increased when we consider that the pilot ladder in question was rigged to the boat deck of the vessel without any safe means to alight at the main deck level, and without any gangway or deck watch to supervise the return of the liberty party.

There was also evidence that considerable exertion is required to climb twenty feet up a pilot ladder (Tr. 147-149). The entire cause of the accident could have been avoided by rigging the ship's accommodation ladder which is designed and intended for use by a vessel at anchor. The boarding of the vessel would then have been a safe and simple operation rather than a test of strength and agility.

Respondent thus failed in its non-delegable duty to provide libellant with a safe place in which to work. The overwhelming trend of maritime decisions is toward the establishment of a higher standard of care on the part of ship owners than is required of employers on shore. *Armit v. Loveland*, 115 F.2d 308; *Taber v. Cities Service Oil Co.*, 1950 A.M.C. 1405; *Cleveland-*

*Cliffs Iron Co. v. Martini*, 96 F.2d 632; *Storgard v. France & Canada S. S. Corp.*, 263 F. 545.

Libellant obviously concedes that proof of negligence is a prerequisite to recovery under the Jones Act. However, in support of that proposition, respondent cites six cases in its brief (p. 24), five of which involve no negligence on the part of the defendant, and sole negligence on the part of the plaintiff. The sole exception is *Johnson v. U. S. A.*, 333 U.S. 46, where libellant recovered for injuries caused by the negligence of a fellow crewman. Because the negligence of respondent, under the doctrine of respondeat superior is unquestioned in the instant case, these cases cited by respondent have no application herein.

#### **(4) Farley Was Not Negligent.**

Respondent seeks to bar recovery by asserting two theories of negligence on the part of Farley; sole negligence of Farley in being in a dangerous place, and breach of duty.

By the first theory, Farley is asked to anticipate the consequences of the following negligence on respondent's part:

- (a) In providing an unsafe appliance for ingress of the shore liberty party.
- (b) In rigging such appliance in a hazardous manner.
- (c) In failing to supervise its use.
- (d) In employing a wholly untrained crewman to use the appliance.



- (e) The negligence of the fellow crewman in using the appliance in a hazardous manner.

Negligence is never presumed, and the mere showing that three men were struck by Potts' falling body is no proof that they were standing in an area where danger was to be reasonably apprehended. The anticipation of the negligent acts of another is a difficult task when the consequences of such negligence are commonly known. No reported cases can be found which deal with the type of accident here involved. Under these circumstances it would be extremely harsh, unfair and unrealistic to impose upon libellant the onus of apprehending such a freak accident. In the similarly freakish accident involved in the case of *Cleveland-Cliffs Iron Co. v. Metzner*, 150 F.2d 206, cited by respondent, the trespassing plaintiff was allowed to recover.

The case of *Larsson v. Coastwise Line*, 181 F.2d 6, cited by respondent, is clearly distinguishable. The danger whereby Larsson was injured was obvious and inherent in the operation of any machinery. Larsson placed his hand inside machinery which was ready to be turned on at any time. Such recklessness is comparable to working on live electrical wires. The Larsson case is factually parallel to the case of *Portel v. United States*, 85 F. Supp. 488. In that case, libellant failed to ascertain whether the ship's steam lines were shut off prior to working on them. When libellant opened a live steam line, he was injured. The Court mitigated libellant's damages by only 25 per cent because of his contributory negligence. Unlike the instant case, both the Larsson

and Portel cases involve active negligence by the libellant in reckless disregard of commonly apprehended danger.

The cases of *Ford v. United Fruit Co.*, 171 F.2d 641; *Seville v. U. S. A.*, 163 F.2d 296; *Atlantic Coast R. R. Co. v. Anderson*, 221 F.2d 548; *U. S. Gypsum Co. v. Balfanz*, 193 F.2d 1, and *Witt v. U. S. A.*, 82 F. Supp. 696, cited by respondent all involve sole negligence of the plaintiff and a total absence of negligence on the part of the defendant. The established proof of respondent's negligence herein renders these cases inapplicable.

The remaining cases cited by respondent in support of this theory are distinguishable in that they involve plaintiff's disregard of a specific company regulation, disobedience of orders, or disregard of commonly apprehended danger.

At the time of his injury, libellant was on authorized leave from duty for purposes of diversion and relaxation, which he had a right to enjoy. From his limited observation of Potts ashore, and on the returning launch, Farley had no reason to believe that the assistant cook would later act negligently. According to respondent's own witness, Potts was in fact sober (Tr. 626), and Farley did not know of Potts' complete inexperience in ascending pilot ladders. When the liberty launch arrived alongside the vessel, the liberty party got up from their seats and moved forward toward the bow of the launch preparatory to climbing the ladder. This was certainly the natural thing to do. Apparently the only persons in the liberty launch who knew that Potts' hands were

encumbered were Potts himself, and his companion, S. L. Johnson. Johnson, who thought Potts was carrying some souvenirs, did not even watch Potts' ascent and did not know when Potts fell from the ladder (Tr. 629).

Potts testified that although his hands were encumbered, he kept both hands on the ladder (Tr. 417, 418). Thus, the encumbrances would not have been visible to Farley because the ascending man's body was between Farley and the ladder. The lighting conditions on the launch were dark or hazy (Tr. 399). Farley was standing in the midst of other crewmen, and the available space on the launch was small. If Farley had seen Potts fall, it is extremely doubtful that he could have avoided injury. There was no place to run to.

Respondent's breach of duty theory is wholly lacking in evidentiary support. There was no testimony that a second assistant engineer on shore leave has any duty or authority to supervise, control or conduct a boarding operation for seamen returning to the vessel. On the contrary, the evidence was that such was the duty of the deck officer on watch or his designate (Tr. 159, 160, 468).

Libellant's evidence showed that a second assistant engineer exercises a command function as a ship's officer only as to his subordinates in the engine department of the vessel during his hours of duty in that department (Tr. 152, 153, 469). He is otherwise a technical or mechanical specialist (as a radio or radar operator would be), having no power to issue order to men outside his department. It is noteworthy that respondent

does not point out any evidence whereby the alleged duty is stated.

The statute (18 U.S.C.A., Sec. 2196), cited by respondent, creates no duties whatever. It merely prescribes punishment for wilful neglect of duty by any merchant vessel employee, regardless of rank.

Under the evidence herein, Farley had no duty to warn Potts until he became aware of Potts' negligence, and perhaps not even then. Respondent strenuously contends that the employer had no duty to warn the inexperienced seaman, Potts, of the danger of climbing a pilot ladder with encumbered hands. This, so respondent contends, is because there is no duty to warn against obvious dangers.

Yet, respondent contends that a second assistant engineer, who had no authority to control Potts' actions, and who was not aware of his inexperience, had such a duty to warn of obvious dangers. Respondent overlooks the inconsistencies of its arguments in its zeal to fabricate a duty whereby recovery may be barred.

The case of *Jensen v. U. S.*, 184 F.2d 72, cited by respondent, is distinguishable in two respects:

- (1) The ship's officers had actual knowledge of a situation dangerous to the safety of the crew.

- (2) Despite that knowledge, the officers conducted a fight between drunken crewmen on the deck of the vessel.

The case of *Walker v. Lykes Bros. S. S. Co.*, 193 F.2d 772, cited by respondent, is one involving unsea-



worthiness, not negligence. In our view, the court's attempt in the Walker case, to distinguish between types of contributory negligence, is unsound and had the effect of resurrecting the defense of assumption of risk. This is clearly pointed out in the case of *Boat Dagny v. Todd*, 224 F.2d 203 (1 Cir. 1955), wherein the decision in the Walker case is carefully analyzed and determined to be unsound. Speaking of the Walker case, the First Circuit Court of Appeals observed:

"We cannot find in the Act any suggestion that Congress had in mind this refinement between the two species of contributory fault. It is significant that Judge Hand felt himself to be bound by cases which were decided before the 1939 amendment to the Federal Employers' Liability Act, which plugged up what Congress deemed to be a leak in the original Act by abolishing specifically the defense of assumption of risk."

The Walker case has not been followed outside the Second Circuit. The case of *Mason v. Lynch Bros. Co.*, 131 F. Supp. 255, cited by respondent, follows the disguised assumption of risk doctrine set forth in the Walker case. However, the court clearly indicated that the doctrine is applicable only to masters of vessels. Therein it is stated:

"If this controversy involved a seaman not serving as master of the vessel at the time, this court would permit a recovery."

The case of *Mormino v. Leon Hess, Inc.*, 119 F. Supp. 314, was decided by a district court of the Second Circuit, subsequent to the Walker case. The case further narrows and qualifies the Walker decision and was affirmed by the Second Circuit Court of Appeals

in 210 F.2d 831. In that case, libellant was an engineer who was ordered to fix a leaky oil connection. Libellant waited six days before attempting the repair, at which time a large pool of oil had collected. The court found libellant negligent in stepping into the pool of oil where-by he fell. The court refused to apply the Walker case doctrine and stated:

“Nor is libellant barred from maintaining this action because he sustained his injury in the performance of an act designed to remove the condition which caused his injury. In relying on such a proposition, respondent impliedly invokes the doctrine of assumption of the risk, *Becker v. Waterman S. S. Corp.*, 2 Cir., 179 F.2d 713, a defense which is not available in a suit brought under the Jones Act. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265.”

The cases of *Battice v. U. S.*, 79 F. Supp. 932, and *Mullen v. Fitzimmons & Connell Dredge & Dock Co.*, 191 F.2d 82, cited by respondent, are both cases involving no negligence or unseaworthiness on the part of the ship. Although libellant was negligent in both cases, the cases are only authority for the proposition that proof of negligence or unseaworthiness is a prerequisite to recovery under the Jones Act. Respondent's ingeniously created breach of duty theory therefore collapses for lack of evidentiary or judicial support.

If there was any negligence on libellant's part, such was so minuscule as to permit a recovery even if the doctrine of contributory negligence were available as an absolute defense to this suit.

### (5) Ship Was Unseaworthy.

The ship owner's warranty of seaworthiness presents a species of liability without fault, as to latent or patent defects in the ship's hull, gear or crew. The ship owner's liability is that of an insurer, if the warranty of seaworthiness is breached. The warranty is that the hull, gear and crew shall be reasonably fit to meet the usual contingencies of a voyage. *Socony-Vacuum Oil Co., Inc., v. Smith*, 305 U.S. 424, 83 L. Ed. 265; *Sea's Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099; *Keene v. Overseas Tank Ship Corp*, 194 F.2d 515 (2 Cir. 1954, Cert. Den., 343 U.S. 966, 96 L. Ed. 1363; *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 99 L. Ed. 296.

Libellant contends that a ship cannot be seaworthy unless a reasonably safe appliance for the crew's ingress and egress is rigged while the ship is at anchor. The case of *Sea's Shipping Co. v. Sieracki*, supra, holds that the warranty of seaworthiness "applies as well when the ship is moored at a dock as well as when it is at sea."

In the instant case, respondent's vessel was unseaworthy because it was not fitted out with an appliance for ingress and egress which was adequate for the purpose for which it was intended. The adequacy of the pilot ladder as a seaworthy device must be tested by the conditions prevailing at the time of its use, and the purpose for which it is intended. The undisputed evidence is that the pilot ladder was rigged to the boat deck rail of the vessel, to provide ingress and egress at the main deck level, without any platform, for the ship's crew on shore liberty, without a deck or gangway watch

being provided to supervise its use. It seems clear that the appliance was inadequate for such a purpose. In any case, the use of the appliance under these circumstances constitutes negligence.

A vessel is unseaworthy if the master or the crew fail to use safe appliances furnished by the ship owner. *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 88 L. Ed. 561.

Libellant further contends that the vessel was unseaworthy in that a member of its crew, Malcolm Edward Potts, was an incompetent seaman, and was not equal in seamanship to ordinary men in the calling.

It is now clear that the warranty of seaworthiness runs not only to the ship's hull and gear, but also to its crew. The warranty of seaworthiness of the crew was clearly defined in the case of *Keene v. Overseas Tank Ship Corp.*, *supra*, as follows:

"Applied to seamen, such a warranty is, not that the seaman is competent to meet all contingencies; but that he is equal in disposition and *seamanship* to the ordinary man in the calling." (Emphasis supplied.)

The the same effect is the case of *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 99 L. Ed. 296. Therein the decision of the Fifth Circuit Court of Appeals was reversed, and a recovery allowed.

We observe that both of the last above cited cases involve a situation where the ship's servant is obviously acting outside the scope of his employment in assaulting a fellow employee, and the master had not know-



ingly hired an incompetent servant. There is considerably more equity in requiring the ship owner to respond in damages where the accident is caused by a lack of elementary seamanship by an inexperienced crewman who is acting within the scope of his employment. As was mentioned in the *Keene v. Overseas Tank Ship Corp.* case, after the owner had used due care in selecting the crew, there may be cases where certain crewmen will turn out to be not equal in disposition to the ordinary man of the calling. However, the existence of a savage or vicious disposition is a difficult trait to ferret out, in normal circumstances. By contrast, basic lack of seamanship is easily ascertainable and to a large degree, remediable.

In the instant case, Potts had never been to sea previously, and had never ascended a pilot ladder. The evidence is uncontradicted that the master of the vessel gave no instructions to crewmen concerning the proper method of ascending a pilot ladder (Tr. 598, 599), although it was his duty to do so.

It is the non-delegable duty of a ship owner to man his vessel with competent officers and men. The cases of *In Re: Pacific Mail S. S. Co.*, 130 Fed. 76, and *The Drill Boat No. 4*, 233 Fed. 589, fix liability on the ship owner based on unseaworthiness by reason of the incompetency of the crew.

We conclude that assistant cook Potts has been clearly shown not to have been equal in seamanship to the ordinary man in the calling, both by his complete inexperience at sea and by his abortive attempt to climb the pilot ladder in the manner previously described.

## (6) Findings of Trial Court, Supported by Substantial Evidence, Should Not Be Disturbed.

The brief of respondent and its statement of Points on Appeal represent primarily an attack on the trial judge's findings of fact on the issue of contributory negligence. It is well settled that the findings of the trial judge will not be disturbed on appeal if supported by substantial evidence, and not clearly erroneous. *City of Portland v. Luckenbach S. S. Co., Inc. (The Marine Leopard)*, 217 F.2d 894 (9 Cir. 1954); *The President Madison*, 91 F.2d 835; *States S. S. Co. v. U. S. A., et al (The Pennsylvania)*, Docket No. 15131, decided May 31, 1957, 9th C.C.A.

As was stated by this court in the case of *Mattson Navigation Co. v. Hansen*, 132 F.2d 487 (9 Cir., 1942):

"The sufficiency of the findings is to be considered here with reference to the provision of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following Sec. 723 (c): 'Findings . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'"

In this case, three ship's captains testified in Court as expert witnesses concerning the various contentions of the parties. Libellant himself, and Leo Zaleski, 3rd assistant engineer aboard the "S. S. AUGUSTIN DALY" also testified concerning the facts of the accident. The trial court had the opportunity of observing the demeanour of these witnesses, and was in an excellent position to judge the credibility of their testimony. Respondent now asks this court to re-weigh and re-evaluate the testimony based upon the cold record.

The record contains ample evidence to support the findings of the trial court. The findings and decree were not signed until approximately eight months after the trial of the case. In the interim, the record shows that the contentions of the parties were argued and re-argued, both orally and on briefs.

Although an appeal in admiralty is denominated a trial re novo, this court has limited the scope of re-examination of the trial court's findings of fact to matters clearly erroneous or not supported by substantial evidence. Such is not the case herein.

### **BRIEF REPLY ON DAMAGES**

Respondent makes no true answer to libellant's appeal on the issue of damages. Respondent indulges in pure speculation on such subjects as the amount of work available for seamen, and the availability of social security benefits for a man who has had no social security earnings for the past five years. We feel justified in asking this court to take judicial notice of the fact that there has been an overall wage increase of approximately twelve per cent in the shipping industry in the past two years. This court recognized the existence of the ever-ascending spiral of wages and prices in the case of *U. S. A. v. Luehr*, 208 F.2d 138.

It also appears that respondent takes issue with the uncontradicted medical testimony relating to the nature and extent of libellant's injuries and disability. Respondent does not repeat its previous estimate of Farley's

wage loss to the date of trial, and future wage loss (Tr. 29). We do not understand how respondent can now in good conscience contend that the trial court's award of damages was even remotely compensatory. Respondent offers no evidence or computations to support the inadequate award, but merely contends that it should not be disturbed.

No clearer illustration could be found of a finding of fact (damages) which is unsupported by any substantial evidence. Further, Finding of Fact No. 10 (Tr. 40) is wholly inconsistent with Findings of Fact Nos. 7, 8, and 9, which are supported by substantial evidence.

It thus becomes the duty of this court to award compensatory damages based upon the trial court's findings of injury, disability, pain and suffering, and wage loss.

Respectfully submitted,

WILLIAMS & ALLEY,  
DAVID R. WILLIAMS,

Proctors for Appellant, John Farley.



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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JOHN FARLEY,

*Appellant,*

vs.

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**REPLY BRIEF OF APPELLANT,**  
**UNITED STATES OF AMERICA**

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No. ....

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**REPLY BRIEF OF APPELLANT,**  
**UNITED STATES OF AMERICA**

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**INTRODUCTORY**

This brief constitutes the reply of appellant, United States of America, to the answer of appellee, John Farley, bearing on the question of jurisdiction of the Court in the absence of compliance with statutory conditions precedent to suit. Appellant's position on the merits has been fully stated in its opening brief.

## **THIRD SUPPLEMENTAL APPROPRIATION ACT OF 1951 REQUIRES ADMINISTRATIVE DISALLOWANCE**

### **1951 Act Revived Claim Provisions of Clarification Act**

In his answering brief, the libelant has contended that the Third Supplemental Appropriation Act of 1951, 65 Stat. 59, 46 U.S.C.A. 1241(a), "1951 Act," did not re-enact or revive the claim provisions of the Clarification Act, 57 Stat. 45, 50 U.S.C.A. App. 1291. Libelant argues that Congress only intended to revive certain limited provisions relating to benefits for government employees (Lib. Br. 8).

This argument completely ignores the plain language of the 1951 Act. Congress did not merely re-enact the former provisions relating to civil service, compensation and other similar matters. The statute clearly and unequivocally re-enacted and revived the claim provisions of the Clarification Act together with the other sections which are referred to in the statute.

How can it possibly be said that Congress did not intend to revive the claim provisions when the 1951 Act specifically refers to these provisions of the Clarification Act and states that they shall be applicable to seamen employed by the United States? Such a plain and unambiguous statute is certainly not subject to the interpretation placed on it by the libelant.

In support of his argument as to the intention of Congress, libelant has further stated "That the 1951

Supplemental Appropriations Act was not an express or implied reviver of the Clarification Act is thus shown by statutory history and careful analysis." (Lib. Br. 9). An examination of the statutory history of the 1951 Act indicates that the contrary is true.

The relevant portions of the 1951 Act which revived the Clarification Act are reported in 1953 AMC 1749. The report is entitled "W. S. A. Clarification Act, 1943—Revival of Various Provisions." It further states in a footnote on page 1750 that the revival covers, among other things, rights of merchant seaman with respect to death, injuries, maintenance and cure and it also refers to notice and administrative disallowance.

The Clarification Act is also reported in 50 U.S.C.A. App. 1291. The permanent bound portion of Title 50 merely contains the official citation and a brief description of the statute. On the other hand, the Cumulative Annual Pocket Part sets forth that portion of the Clarification Act which was revived by the 1951 Act.

More important, these revived provisions of the Clarification Act were fully considered and discussed in hearings before a subcommittee of Congress prior to the passage of the 1951 Act. See Hearings on HR 3587 before subcommittee of the House Committee on Appropriations, 82nd Cong., 1st Sess., March 21, 1951, pp. 194, et seq.

The purpose of the 1951 Act was clearly expressed by Admiral Cochrane during this hearing as follows:

"MR. THOMAS. Is this language legislation, Admiral?

Admiral COCHRANE. The first proviso might be deemed to be legislation. It is intended, however, in the main, merely to remove any possible cloud upon the continued applicability of Public Law No. 17, Seventy-eighth Congress, to the operations of, and the seamen employed on vessels of, the Maritime Administration, which might be implied by a limitation contained in the Naval Appropriation Act, for fiscal year 1947, and continued in subsequent appropriation acts." (p. 195)

The above reference to the Naval Appropriation Act for the fiscal year 1947 is quite significant. This statute is Public Law 492, 79th Cong., 60 Stat. 481, which in part terminated the War Shipping Administration. This is the statute which is used as the basis for decisions such as *Burton v. United States*, 109 F. Supp. 139 (S.D. N.Y. 1952), which held that the requirement for administrative disallowance prevailed at the most for only two years after the termination of the War Shipping Administration.

In addition, the requirement of administrative disallowance was specifically discussed. The following occurred during the hearing:

"MR. THOMAS. Are there any other points involved there with reference to the seamen?"

Admiral COCHRANE. One of the provisions in this is that any suits that may arise out of this would be enforced under the provisions of the Suits in Admiralty Act.

MR. THOMAS. Who would be the defendant in the case?

Admiral COCHRANE. These would be suits by the men themselves against the United States in cases of personal injury or something of that sort *where the claims were not settled administratively.*" (Emphasis added, p. 198)



The 1951 Act was passed at the beginning of the Korean War when the United States was again required to operate many merchant vessels. Congress obviously intended to restore the same practice and procedure which existed during World War II under the Clarification Act.

Libelant's argument that Congress did not intend to revive the claim provisions of the Clarification Act is not supported by the language of the statute, reason or statutory history.

Both of the parties to this appeal have previously referred to the revocation of General Order 32 by the Maritime Administration on December 21, 1953. The regulations were replaced by the Maritime Administration on April 7, 1955, pursuant to the stated authority contained in the Third Supplemental Appropriations Act of 1951. 20 Fed. Reg. 2414, 1955 AMC 1134.

Libelant contends that the revocation of General Order 32 destroys the entire basis for our objections to jurisdiction in this case. As we have previously stated, we do not believe that the revocation of General Order 32 could possibly have the effect of changing or revoking the requirements of the 1951 Act.

It is clear that statutory requirements cannot be suspended by administrative agencies. *Illinois Central Railroad Company v. Williams*, 242 U.S. 462 (1917). As stated in *United States v. Monarch Distributing Co.*, 116 F. (2d) 11 (CA 7, 1940), cert. denied 312 U.S. 695:

"The point is made that appellee introduced no evidence to show there were any regulations concern-

ing the making of the entry. We are unable to see any merit to the point for the reason that the appellants were bound to keep the records prescribed by the statute and make the proper entries whether the Commissioner of Internal Revenue has prescribed any rules and regulations on the subject or not." (116 F. (2d) at 13)

The re-enacted Clarification Act provides that "Any claim . . . shall, *if administratively disallowed* in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act . . ." (Emphasis added). The statute does not establish a mere standard which requires regulation to become effective. The statute imposes a duty which is absolute and imperative prior to or in the absence of any regulations.

The 1951 Act itself requires administrative disallowance. In the absence of detailed regulations, the statute necessarily requires express disallowance or constructive disallowance by the expiration of either 60 days or a reasonable length of time.

#### **Administrative Disallowance Is a Condition Precedent to Suits Against the United States**

The libelant finally contends that if there is a requirement of administrative disallowance it is not a condition precedent to filing a libel but is only a temporary bar to its enforcement. He cites *Manderscheid v. United States*, 88 F. Supp. 232 (N.D. Cal. S.D. 1950), and further argues that it is not the practice in admiralty to dismiss a libel because it has been prematurely filed (Lib. Br. 12-15).

Libelant overlooks the fact that this is not a general admiralty proceeding between private litigants. This case involves the proper fulfilment of a statutory condition to bringing an action against the United States. *Danstrup v. The Richmond P. Hobson*, 112 F. Supp. 851 (E.D. N.Y. 1953).

The cases cited by libelant with respect to prematurity of filing do not involve cases under the Clarification Act and they are not analogous. There is a vast difference between the power to cure defective allegations and the power to correct a failure to comply with a statutory condition.

*Manderscheid v. United States*, supra, which is relied on by the libelant, apparently holds that administrative disallowance is only a temporary bar to the enforcement of a seaman's claim against the United States. As far as we have been able to determine, all of the federal authority is to the contrary.

Numerous cases have repeatedly held that the requirement of administrative disallowance is a condition precedent. An action cannot be commenced against the United States until a claim has been administratively disallowed. *Fox v. Alcoa SS Co.*, 143 F. (2d) 667 (CA 5, 1944), cert. denied 323 U.S. 788; *Rodinciuc v. United States*, 175 F. (2d) 479 (CA 3, 1949), cert. denied 338 U.S. 895; *Thurston v. United States*, 179 F. (2d) 514 (CA 9, 1950); *McMahon v. United States*, 186 F. (2d) 227 (CA 3, 1950), affirmed 342 U.S. 25 (1951); *Thomas v. United States*, 127 F. Supp. 48 (E.D. Pa. 1954).

The privilege of suing is given only after administrative disallowance of a written claim. *Fox v. Alcoa SS Co.*, 143 F. (2d) at 667. Until then a seaman is precluded from instituting suit upon his causes of action. *McMahon v. United States*, 186 F. (2d) 227, 230. Or, as stated by this Court in *Thurston v. United States*, supra:

"It is apparent that the provision for the disallowance of claims before beginning suit makes the seaman's right under the Clarification Act quite different from his right if employed on a 'privately owned' vessel or under the Suits in Admiralty Act. Seamen in the latter two cases have the right to file their libels as soon as injured. Under the Clarification Act they must wait until their claims are filed and disallowed." (179 F. (2d) at 515)

The duty to obtain administrative disallowance is a condition precedent which must be alleged and proved. It is a statutory condition and not merely a temporary bar to the enforcement of a libel against the United States.

The libelant still has not indicated any reason or excuse for his failure to file a timely claim and to obtain administrative disallowance. The United States was not obligated to apply to the district court for an extension of time or for a stay of the proceedings when it clearly appeared that the case was not properly before the court. The libelant never acquired a cause of action and the court never acquired jurisdiction. The exceptions of the United States should have been immediately sustained.



## CONCLUSION

When the United States of America granted its consent to be sued in accordance with the Suits in Admiralty Act, it imposed conditions precedent; namely, the presenting of a claim and the actual or administrative disallowance of the claim. Neither reason nor authority support the view that the trial court could obtain jurisdiction unless these conditions had been met. When appellee's counsel prepared and filed the libel on April 2, 1954, he obviously concurred in this view of the law for he alleged in paragraph II (Tr. 4):

"That heretofore, on or about the 25th day of March, 1954, Libelant made and presented a claim as herein alleged to the United States of America, Respondent, and to the general agent, W. R. Chamberlin & Company, and that said claim has been neither accepted nor rejected to this date, and the same is deemed administratively disallowed."

The trial court should have sustained the exceptions of appellant, United States of America, to the jurisdiction and it is our considered opinion that appellant's exceptions to the jurisdiction should now be sustained.

Respectfully submitted,

C. E. LUCKEY,  
United States Attorney,

KRAUSE, EVANS & LINDSAY,  
GUNTHER F. KRAUSE,  
JACK L. KENNEDY,

Proctors for Appellee-Appellant.



No. 15231

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**United States  
Court of Appeals**  
for the Ninth Circuit

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CITY OF ANCHORAGE, a Municipal Corporation,

Appellant.

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,

Appellee.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Third Division**

**FILED**

**NOV 12 1956**





No. 15231

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**United States  
Court of Appeals**  
for the Ninth Circuit

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CITY OF ANCHORAGE, a Municipal Corporation,

Appellant.

VS.

CHUGACH ELECTRIC ASSOCIATION, INC.,

Appellee.

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**Transcript of Record**

---

**Appeal from the District Court  
for the District of Alaska,  
Third Division**









ATTORNEYS OF RECORD

JAMES M. FITZGERALD,  
City Hall,  
Anchorage, Alaska,  
Attorney for Appellant,  
City of Anchorage.

EDGAR PAUL BOYKO,  
Turnagain Arms, 523 3rd Ave.,  
Anchorage, Alaska,  
Attorney for Appellees.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the Territory  
of Alaska, Third Division

In the Matter of

THE DELINQUENT TAX ROLL FOR THE  
CITY OF ANCHORAGE FOR THE YEAR  
1954

No. A-10,396

SUPPLEMENTAL PETITION FOR  
JUDGMENT AND ORDER OF SALE

The Petitioner, City of Anchorage, a municipal corporation, respectfully shows:

1. That the City of Anchorage is a municipal corporation duly organized and existing under and by virtue of the laws of the United States and Territory of Alaska and is situate within the Third Judicial Division of said Territory.

2. That during the year 1953, and prior thereto, pursuant to the provisions of Article 5, Chapter 8, Anchorage General Code, as amended, and the laws of the Territory of Alaska, as amended, the duly and regularly appointed, qualified and acting assessor of said city made up an assessment roll of property within the corporate boundaries of said city subject to taxation for municipal purposes; that said roll was duly and regularly equalized by the City Council of said city as provided by the applicable laws, ordinances and amendments thereof and thereto; that thereafter the said City Council according to law, fixed the rate of tax levy for the

year 1954 at twenty (20) mills upon each dollar of taxable property for the said tax year, namely, the calendar year of 1954.

3. That all unpaid taxes upon real and personal property in said city during the year 1954 so assessed and equalized became delinquent either at five o'clock p.m., February 15, 1954, or at five o'clock p.m., June 15, 1954, depending upon whether said taxes were paid in installments and whether said installments were unpaid on the due dates; that upon being delinquent said taxes became subject to a penalty of fifteen per cent if unpaid after June 15, plus interest at the rate of six per cent per annum on said unpaid tax but not including the penalty from date of delinquency; that if said taxes became delinquent on February 15, a penalty of seven and one-half per cent was added to all tax delinquent until June 15, plus interest at six per cent on the unpaid taxes but not penalty, and after June 15 a penalty of fifteen per cent plus interest at six per cent on unpaid taxes not including penalty.

4. That thereafter and pursuant to the provisions of said Article 5, Chapter 8, of the Anchorage General Code, as amended, and pursuant to order of the Anchorage City Council adopted on the 19th day of November, 1954, directing the City Clerk-Treasurer of said City to publish the delinquent tax roll for the year 1954, as prepared by the City Assessor; that the "Anchorage Daily News" was designated a newspaper of general circulation in the City of Anchorage, and that publication therein was



directed once each week for five successive weeks beginning with the issue of November 30, 1954, and continuing through December 28, 1954; that pursuant to the order of the Anchorage City Council said publication was made on the said dates as appears by the affidavit made on behalf of said newspaper and attached hereto and filed herewith as Exhibit A; that said tax roll detailed as to whom the property was assessed, the year of delinquency, the property involved, the real property tax due and unpaid on each parcel of property, the penalty, interest and cost separately stated, due and unpaid and the total amount of the delinquency.

5. That a copy of said delinquent tax roll so published is filed herewith and is by reference incorporated in and made a part of this petition as Exhibit B.

6. That the said taxes on the property mentioned and described in the said delinquent tax roll (Exhibit B) has not yet been paid and the same is wholly due, owing, and unpaid to the City of Anchorage, together with penalty, interest, and costs as above mentioned.

Wherefore, the said City of Anchorage respectfully prays the Court to pass upon and determine the legality of said delinquent tax roll and of taxes on the property therein described or mentioned; and that the Court make an order directing the property described upon which the taxes have not been paid to be sold by the City of Anchorage to

satisfy and discharge the lien of taxes thereon, together with penalties aforesaid, interest, and costs, including the cost of this proceeding; and for other and further relief as to the Court may seem just and equitable.

Dated at Anchorage, Alaska, this 7 day of January, 1955.

/s/ B. W. BOEKE,  
City Clerk-Treasurer,  
City of Anchorage.

Duly verified.

## EXHIBIT A

### Affidavit of Publication

#### City of Anchorage—Notice of Tax Sale

The delinquent tax roll of real property for the year 1954 has been completed and is open for inspection at the office of the City Clerk-Treasurer, City Hall, Anchorage, Alaska.

The said delinquent tax roll will be presented in the District Court of the Third Division, Territory of Alaska, for judgment and order of sale on January 7, 1955, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard.

The tract on said roll, the amount of unpaid tax, penalty and interest due thereon, and the name of person, or persons, or firm, or corporations, to whom such tax are assessed follow:

Alaska Railroad Terminal Yards Area

Name: Chugach Electric Association, Inc.

Description: Chugach Electric Association, Inc.,  
portion of the power and electric generating  
plant in the Alaska Railroad Terminal Yards  
area located on the north bank of Ship Creek,  
and also known to be located in the SW $\frac{1}{4}$  of  
the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$ , Sec. 7, T13, R3W, S.M.

Tax: \$38,314.00.

Penalty: \$5,747.10.

Interest: \$2,056.18.

Costs: \$60.00.

Total: \$46,177.28.

Delinquent Date: 2-15-54.

Certificate

I Hereby Certify that the foregoing is a true and  
correct roll of the delinquent tax of Anchorage for  
the year 1954, and that it shows the date when said  
tax became delinquent, the total amount of said tax,  
penalty and interest separately stated and the ag-  
gregate of the whole thereof.

B. W. BOEKE,  
City Clerk-Treasurer.

Publication Dates:

November 30, 1954.

December 7, 14, 21, and 28, 1954.

P. O. No. 4514—Nov.

P. O. No. 4515—Dec.

Territory of Alaska,  
Third Judicial District—ss.

June Welling being first duly sworn on oath deposes and says that she is the Principal Clerk of the Anchorage News, a daily newspaper. That said newspaper has been approved as a legal newspaper by the Third Judicial Court, Anchorage, Alaska, and it is now and has been published in the English language continually as a daily newspaper in Anchorage, Alaska, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the annexed is a true copy of a Notice of Tax Sale as it was published in regular issues (and not in supplemental form) of said newspaper for a period of five insertions, commencing on the 30th day of November, 1954, and ending on the 28th day of December, 1954, both dates inclusive, and that such newspaper was regularly distributed to its subscribers during all of said period. That the full amount of the fee charged for the foregoing publication is the sum of \$75.00, which amount has been paid in full at the rate of \$1.00 per square for the first insertion and 75 cents per square for each subsequent insertion.

/s/ JUNE WELLING.

Subscribed and sworn to before me this 6 day of January, 1955.

[Seal]

REG. T. BOWKER,

Notary Public in and for the Territory of Alaska,  
Third Division, Anchorage, Alaska.

My commission expires August 30, 1958.



EXHIBIT B

City of Anchorage Delinquent Real Tax Roll for  
1953-1954, Alaska Railroad Terminal Yards Area

Name: Chugach Electric Association, Inc.

Description: Chugach Electric Association, Inc.,  
portion of the power and electric generating  
plant in the Alaska Railroad Terminal Yards  
area located on the north bank of Ship Creek,  
and also known to be located in the SW $\frac{1}{4}$  of  
the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 7, T13, R3W,  
S.M.

Tax: \$38,314.00.

Penalty: \$5,747.10.

Interest: \$2,056.18.

Costs: \$60.00.

Total: \$46,177.28.

Delinquent Date: 2-15-54.

Certificate as to Delinquent Tax Roll 1954

I, B. W. Boeke, City Clerk-Treasurer of the City  
of Anchorage, Alaska, hereby certify that the above  
roll is a true and correct roll of delinquent taxes of  
the City of Anchorage, Alaska, for the year 1954.  
That the preceding figures are given as of January  
7, 1955.

Dated at Anchorage, Alaska, this 7 day of Janu-  
ary, 1955.

/s/ B. W. BOEKE.

[Endorsed]: Filed January 7, 1955.

In the District Court for the Territory of Alaska,  
Third Division, Anchorage, Alaska

No. A-10,396

In the matter of

**THE DELINQUENT TAX ROLL OF THE  
CITY OF ANCHORAGE FOR THE YEAR  
1954**

**OBJECTION TO TAX AND PROPOSED  
ORDER OF SALE**

Chugach Electric Association, Inc., a non-profit co-operative corporation organized and existing by virtue of the laws of the Territory of Alaska, by Edgar Paul Boyko, its attorney, respectfully represents:

1. The Objector is a legal person having an equitable interest in a tract listed or alleged to be listed on the delinquent tax roll of real property for the year 1954, of the City of Anchorage, which is the subject matter of the above-entitled proceedings; and the Objector does hereby appear and present to this Honorable Court its objections to and contest of the validity of the tax on such property or the granting of an order of sale thereof. The grounds of the objection are as set forth below and the Objector hereby requests this Honorable Court to hear and determine these objections and to render such decision thereon as may be legal and just, pursuant to Article 7, Chapter 1, of Title 16 of the Alaska Compiled Laws Annotated, 1949.

2. The tract of land listed or claimed to be listed on said delinquent tax roll is part and parcel of certain lands owned by the United States of America and withdrawn from the public domain for and on behalf of the Alaska Railroad, an agency of the United States Department of the Interior, which said withdrawn lands are known as the Alaska Railroad Terminal Reserve, according to the official land records of the United States Land Office, at Anchorage, Alaska. Lands of the United States may not legally be made subject to taxation by the Territory of Alaska, or by any political subdivision thereof, including municipal corporations and, moreover, have been specifically exempted from such taxation by Chapter 10 of the Session Laws of Alaska, 1949, as amended, supplemented and re-enacted by Chapter 33 of the Session Laws of Alaska, 1953, and particularly Section 3 thereof.

3. Legal title to the tract and improvements listed or alleged to be listed on said delinquent tax roll and described on the published notice thereof as follows: "Chugach Electric Association, Inc., portion of the power and electric generating plant in the Alaska Railroad Terminal Yards located on the north bank of Ship Creek, and also known to be located in the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$ , Sec. 7, T. 13, R. 3 W., S. M." is vested in part, in the United States of America, acting through the Administrator of the Rural Electrification Administration, United States Department of Agriculture and, in the remaining part, in the Alaska Railroad,

an agency of the United States Department of the Interior and is therefore exempted from such taxation for the reasons set forth above.

4. Equitable title to the said tract and improvements listed or alleged to be listed on the said delinquent tax roll is vested, in part, in the Alaska Railroad, an agency of the United States Department of the Interior and, in the remaining part, in Chugach Electric Association, Inc., a local co-operative organization of borrowers through which loans have been made and are being made by the Rural Electrification Administration, United States Department of Agriculture and which is therefore an instrumentality of the United States Government, and the said tract is therefore exempt from taxation for the reasons stated above.

5. The Objector named herein, Chugach Electric Association, Inc., in whom equitable title to part of the improvements on this said tract is vested as aforesaid, is also specifically exempt from taxation by the City of Anchorage by virtue of the provisions of Section 6(b) of Chapter 10, Session Laws of Alaska, 1949, as amended, supplemented and reenacted by Section 3 of Chapter 33, Session Laws of Alaska, 1953.

6. The property described in the said published notice as "Chugach Electric Association, Inc., portion of the power and electric generating plant in the Alaska Railroad Terminal Yards Area located on the north bank of Ship Creek, etc.," is personal



property and not real property and is therefore not subject to these proceedings under the provisions of Article 7, Chapter 1, Title 16, ACLA, 1949, as will more fully appear from the public records of the Alaska Railroad, an agency of the United States of America, and particularly from the instrument known as Contract No. I-3 arr-8394.

7. The tract or property described above and alleged to have been listed on the delinquent tax roll of real property for the year 1954, of the City of Anchorage is not and has not been so listed and is not in fact a part of said delinquent tax roll, as will appear from the records and proceedings of this Honorable Court in the case entitled, "In the Matter of the Delinquent Tax Roll of the City of Anchorage for the Year 1954," Docket No. A-10,-396, and particularly from the completed delinquent tax roll filed therein and certified to by the City Clerk of the City of Anchorage on October 29, 1954, and from the final Judgment and Order of Sale, filed therein on the same date; and the present proceeding and proposed Order of Sale are, therefore, contrary to the applicable statutes as set forth in Article 7, Chapter 1, Title 16, ACLA, 1949, and are null and void.

8. The said tax on such property and the proposed Order of Sale thereof are objected to and their validity is hereby contested for such other and further reasons as may be stated at the time of the hearing hereof.

Wherefore, the Objector named herein respectfully prays that it be hence dismissed and that the City of Anchorage take nothing by its presentation and proposed order and that the Objector have such other and further relief as may be just and proper under the circumstances of this case.

/s/ EDGAR PAUL BOYKO,  
Atty. for Objector, Chugach  
Electric Association, Inc.

Certificate of service attached.

[Endorsed]: Filed January 7, 1955.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Chugach Electric Association, Inc., an Alaskan corporation and a party in interest herein, by Edgar Paul Boyko, its attorney, moves to dismiss the so-called Supplemental Petition for a Judgment and Order of Sale filed herein by the City of Anchorage, on the following grounds:

1. That this Honorable Court lacks jurisdiction to hear the same because the applicable statute under which this proceeding has been brought has not been complied with by the City of Anchorage in several respects, as more particularly set forth below.

2. That Article 7, Chapter 1, of Title 16 ACLA, 1949, does not authorize the filing of a supplemental

delinquent tax roll and that the delinquent tax roll of the City of Anchorage for the year 1954 has been filed heretofore and was certified to be complete and a final Judgment and Order of Sale was issued thereon on October 29, 1954, in case No. A-10,396; and the said case has been closed.

3. That the records of this case show that publication of the Notice of Tax Sale required by statute in this proceeding was not completed until on or after December 28, 1954; that said notice, as published, states that the delinquent tax roll, or "supplemental" delinquent tax roll which is the subject matter of this proceeding will be presented to the District Court for Judgment and Order of Sale on January 7, 1955; and said roll was in fact presented to this Honorable Court on said date; that the applicable statute and particularly Section 16-1-122, ACLA, 1949, requires that said roll shall be presented to the District Court for a Judgment and Order of Sale "on a certain day not less than thirty days after the completion of the publication"; that not more than ten days have elapsed between the date of completion of publication and the presentation of the roll to the Court on the date set forth in said notice; that for the reasons just stated, this Court lacks jurisdiction to proceed further in this case, at least until proper publication has been had and a proper date has been set for the presentation of the said roll.

4. That this motion is filed concurrently with and supplementary to the written Objection to Tax

and proposed Order of Sale filed herein on this day, for the purpose of enabling this Honorable Court to dispose of the issue of jurisdiction, as distinguished from the merits and points of substantive law raised in said objection.

/s/ EDGAR PAUL BOYKO,  
Attorney for Chugach  
Electric Association, Inc.

Certificate of service attached.

[Endorsed]: Filed January 8, 1955.

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[Title of District Court and Cause.]

MOTION TO CONSOLIDATE  
AND TO DISMISS

Chugach Electric Association, Inc., a co-operative corporation of the Territory of Alaska, by Edgar Paul Boyko, its attorney, respectfully represents as follows:

1. That it is a party in interest to each of the above-entitled causes now pending before this Honorable Court and that both of said causes involve a common question of law, which is the subject matter of the Motion to Dismiss hereto subjoined.

2. That the cause of efficiency, economy and good procedure would be served, and the time of the Court and of the parties litigant would be conserved, if the above-entitled causes were to be con-



solidated, at least for the purpose of the hearing on the respective Motions to Dismiss.

3. That the above-entitled causes, and each of them, should be dismissed because the petition upon which each is based fails to state a claim against Chugach Electric Association, Inc., upon which relief can be granted, and, specifically, because the said Chugach Electric Association, Inc., is expressly exempt from taxation by either the City of Anchorage or the Anchorage Independent School District, by virtue of the provisions of Section 6(b) of Chapter 10, Session Laws of Alaska, 1949, as amended, supplemented and re-enacted by Section 3 of Chapter 33, Session Laws of Alaska, 1953, and for other reasons to be stated at the hearing hereof.

Wherefore, Chugach Electric Association, Inc., respectfully moves this Honorable Court as follows:

(a) To consolidate the above-entitled causes for the purpose of hearing of the subjoined Motions to Dismiss, and for such other purpose or purposes as to this Honorable Court may appear proper and just.

(b) To dismiss the above-entitled causes, and each of them, on the grounds hereinabove stated.

/s/ EDGAR PAUL BOYKO,  
Attorney for Chugach  
Electric Association, Inc.

## Notice

To: John L. Rader, Esq., City Hall, Anchorage, Alaska, and E. L. Arnell, Esq., Turnagain Arms Apartments, Anchorage, Alaska, Attorneys for the above-named Petitioners.

Please take notice that the undersigned will bring the within Motion for consolidation and to dismiss on to hearing before the Honorable J. L. McCarrey, Jr., District Judge, in the District Courtroom, Federal Building, Anchorage, Alaska, on Tuesday, August, 2, 1955, at 3:00 o'clock in the afternoon of said day, or as soon thereafter as counsel may be heard.

Said motion will be made and heard upon this Notice and upon the pleadings, papers, records and files in the above-entitled causes.

/s/ EDGAR PAUL BOYKO,  
Attorney for Chugach  
Electric Association, Inc.

Certificate of service attached.

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

M.O. CONSOLIDATION FOR PURPOSES OF  
ARGUMENT ON MOTION TO DISMISS  
ONLY

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarry Jr., District Judge, the following proceedings were had to wit:

Now at this time upon motion of Edgar P. Boyko, counsel for Chugach Electric Co., John L. Rader, for and in behalf of the City of Anchorage and Edward L. Arnell for and in behalf of the Anchorage Independent School District, not objecting,

It is ordered that causes No. A10,396, entitled In the Matter of the Delinquent Tax Roll of the City of Anchorage for the Year 1954, and No. A-11,097, entitled In the Matter of the Application of the Anchorage Independent School District for an Order Directing Sale of all Properties Listed in the Delinquent Tax Roll of Said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955, said Roll being known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955, be and they are hereby consolidated for purposes of arguments on motion to dismiss as to Chugach Electric Association only.

Entered September 1, 1955.

In the District Court for the District  
of Alaska, Third Division

No. A-10,396

In the Matter of

The Delinquent Tax Roll of the City of Anchorage for the Year 1954.

No. A-11,097

In the Matter of

The Application of the Anchorage Independent School District for an Order Directing Sale of All Properties Listed in the Delinquent Tax Roll of Said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955; Said Roll Being Known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955.

(Consolidated)

### OPINION

John Rader for the Petitioner City of Anchorage;  
E. L. Arnell for the Petitioner Anchorage Independent School District; Edgar P. Boyko for Chugach Electric Association, Inc., taxpayer.

These two cases have been consolidated because of a common question of law for the sole purpose of determining a motion to dismiss.



The City of Anchorage, a municipal corporation, in cause No. A-10,396, petitioned the court to foreclose its tax lien for the year 1954, and the Anchorage Independent School District, in cause No. A-11,097, petitioned the court to foreclose its tax liens for the years 1951-1952, 1952-1953, 1953-1954, 1954-1955.

The Chugach Electric Association, Inc., is an Alaskan non-profit co-operative association, organized for the purpose of participating as a co-operative under the Rural Electrification Administration Act of 1936, as amended. (7 USCA 901, et seq.)

While the Chugach Electric Association, Inc., supplies electricity and electrical service to rural areas on monies borrowed from the Rural Electrification Administration, the generating plant itself and accompanying facilities are located inside the corporate limits of the City of Anchorage, and were constructed upon leased ground, within the yards of the Alaska Railroad, in a joint participation undertaking with the Alaska Railroad. The latter is a government-owned railroad that operates under the direction and by virtue of congressional authority granted to the Department of the Interior. (48 USCA 301, et seq.)

A portion of the electricity used by the co-operative is generated within the yards of the Alaska Railroad (*supra*) and is transmitted over lines into the rural areas served by the co-operative. The gen-

erating plant of the co-operative, and a portion of the co-operative transmission lines are likewise located within the boundaries of the Anchorage School District.

In the motion to dismiss, the movant taxpayer, Chugach Electric Association, Inc., originally based its motion upon several procedural defects, and other grounds hereinafter designated. However, these alleged procedural defects have now been waived upon stipulation by the co-operative.

The remaining grounds upon which the motion to dismiss is based are as follows: (1) The co-operative is a governmental instrumentality and, therefore, is not taxable; (2) Its property is located wholly within the Alaska Railroad Reserve with title being in the Government and, therefore, is not taxable; (3) The co-operative has been granted specific immunity from taxation by the Territorial Legislature.

Only point number 3 will be considered, since a favorable determination for the movant on any one of the three points would be controlling.

In 1949, the Territorial Legislature passed an act entitled "Alaska Property Tax Act" and provided, among others, the following exemptions: "The property of the United States, of the Territory, and of any municipal corporation, independent school district, incorporated school district, public utility district and association operating utilities under arrangements with the Rural Electrification Adminis-

tration, shall be exempt hereunder." (Emphasis supplied.) (Chap. 10, Session Laws of Alaska, 1949, Sec. 6(b).)

In 1953, the legislature repealed the "Alaska Property Tax Act." (Chap. 22, Session Laws of Alaska, 1953.)

The same legislature passed a tax act "authorizing and empowering cities, municipalities, school districts, public utility districts and other taxing units to classify property for the purpose of taxation and authorizing the granting of exemptions to certain classes of property; making exemptions granted and classifications made under Chapter 10, Session Laws of Alaska, 1949, binding upon such taxing units and declaring an emergency." (Emphasis supplied.) (See introductory clause, Chapter 33, Session Laws of Alaska, 1953.)

Section 3 of the same act passed by the 1953 legislature concerning taxation provides as follows: "All exemptions granted in whole or in part, and all classifications heretofore made under the provisions of Section 6, Chap. 10, Session Laws of Alaska, 1949, shall remain in full force and effect upon the terms and for the periods granted, and shall be binding upon the Territory, and all cities, municipalities, school districts, public utility districts and other taxing units in which the property which is the subject of classification or exemption is situated, and the exemptions granted or classifications so made shall apply to all taxes levied and as-

sessed by the city, municipality, school district, public utility district or other taxing units where the property is situated, as fully as though they had been granted or made under the provisions of this act. The purpose and intent of this section is to carry into practical effect all classifications made and exemptions granted under the provisions of Chap. 10, Session Laws of Alaska, 1949." (Emphasis supplied.)

"All acts and parts of acts in conflict herewith are hereby repealed to the extent of the conflict." (See Sections 3 and 5, Chap. 33, Session Laws of Alaska, 1953.)

The City of Anchorage opposes point number 3 principally on the basis of:

- a. Statutory construction;
- b. The exemption claimed is in violation of the Territorial Organic Act;
- c. The exemption purportedly granted to an association "\* \* \* under arrangement with the Rural Electrification Administration \* \* \*" is invalid.

The Anchorage Independent School District opposes the same point upon the bases of:

- a. Statutory construction;
- b. Legislative intent;
- c. The claimed exemptions would not apply to a tax not asserted.

Prior to the Alaska Property Tax Act, the Independent School District of the Territory of Alaska levied and collected taxes under legislative



authorization set forth in 37-3-23 ACLA, 1949, and 37-3-53, which, among other things, denominated exemptions of the school tax, while the municipalities levied and collected taxes and gave exemptions through the legislative authorization of 16-1-35(g), as amended, and 16-4-1 ACLA, 1949.

The Alaska Property Tax Act of 1949 (*supra*) purports to be a general codification of the tax law in the Territory of Alaska and clearly enumerates the exemptions (*supra*). I do not believe that the word "codification" can be considered as being used in a "strained" sense, for, in Section 3, the law states: "\* \* \* there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory \* \* \*" (Emphasis supplied.) Then in Section 4 of the Act is found this language: "The tax levied under the provisions of Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district \* \* \*" and "All of the tax levied under this Act which is so collected shall be remitted to such municipalities or school districts as follows: \* \* \*" (Emphasis supplied.)

Counsel for the petitioners have urged upon the court the theory that the legislature did not intend, by Chapter 10 of the 1949 Session Laws, to limit the general taxing power of the municipalities,

school districts, etc. Their arguments fall under their own weight since it cannot be said that the legislature intended that the 1% authorized by this act would be in addition to that authorized to the municipalities and independent school districts enumerated above. Thus, the only reasonable interpretation which one can give to the intent of the legislature in passing Chapter 10 of the 1949 Session Laws is that it intended to codify, so to speak, all of the basic taxing laws into one general act, which they named the "Alaska Property Tax Act," wherein they granted certain exemptions. To give any other interpretation would result in the property of an association " \* \* \* operating utilities under arrangement with the Rural Electrification Administration \* \* \*" being taxed by the Territory of Alaska outside of any municipality, independent school district, incorporated school district or public utility district; yet, at the same time, such an "association" could not be taxed within the boundaries of the foregoing taxing entities.

It is true that the statutes under which taxes are levied and collected by the municipalities and the school districts here in the Territory of Alaska are not referred to specifically by a cross reference. However, when all of the acts are viewed as a whole and construed together, the legislature's intent is clear.

I am of the opinion that Chap. 10 of the Session Laws of Alaska, 1949, is legislation passed under the board, general taxing powers of the sovereignty

of the Territory of Alaska, and while I find that the exception given to associations operating utilities under an arrangement with the R. E. A. is somewhat broad, loose, and a general term not readily or easily defined, I find that this exemption does apply to the movant, Chugach Electric Association, Inc.

Counsel for the petitioner, City of Anchorage, urges that since the Rural Electrification Administration is not limited under the federal law creating it to “\* \* \* the lending of funds to co-operatives,” such an exemption as provided in the laws of the Territory of Alaska could not “\* \* \* be applied with fairness because of the indefiniteness of the term.” (See City petitioner’s brief under Section 4 at page 8.) I cannot accept this as a logical argument for the reason that the tax exemption being considered in this case is limited to those associations which operate “utilities” under an “arrangement” with the R. E. A.; hence, the possible vested authority of R. E. A. to perform another function other than to supply utilities is immaterial in the final analysis and determination of the case before the court.

I find such a classification of the property exempt under the law here in question to be a reasonable one, and should the municipalities, independent school districts, etc., of the Territory of Alaska be aggrieved by such a law covering this exemption, their recourse is with the legislature.

The petitioners make much of the case of the Inter-City Rural Electric Co-operative Corporation vs. Reeves, Commissioner of Revenue, et al., Court of Appeals, Kentucky, 1943, 171 SW 2d, 978, in which case the court held that an exemption under the Kentucky Constitution which required “\* \* \* and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws,” was held to be unconstitutional. I am not greatly moved by this argument for the reason that the Alaska Organic Act requires only that “\* \* \* all taxes shall be uniform upon the same class of subjects” (supra). A comparison of the two acts distinguishes the applicability of the petitioners’ argument, since the constitutional requirements are different. I am of the opinion that the requirement of the Kentucky Constitution in determining the constitutionality of a tax law is that the tax must be assessed uniformly on the same class of property, and, therefore, the only way the property could be exempt would be if the co-operative were considered to own public property, which it is obvious that it did not and, thus, they were liable for taxes. In the Organic Act requirement of the Territory of Alaska is the provision that all persons of a certain class must be treated uniformly. In the case before the court, in referring to “the same class of subjects” (supra), the language of the exemption statute reads: “\* \* \* arrangement with the Rural Electrification Administration \* \* \*” (supra). The choice of this language



is unfortunate; however, it would appear to be a reasonable classification; thus, all co-operatives having "arrangements" with the Rural Electrification Administration must be treated alike.

The petitioners argue in their briefs that it is " \* \* \* a fundamental rule of statutory construction that any enactment must be construed in its entirety, and that any purpose or intent of the legislature must be extracted from all of the provisions, rather than from a single, isolated section." (Page 5 of School District brief.) This I accept as a legal, cardinal principle of statutory construction. (*U. S. vs. Alpers* (1950), 338 US 680; *Great Northern Rail. Co. vs. U. S.* (1942), 315 US 262.)

Points of law which I have considered in the determination of this problem are: There is a presumption against the surrender of taxing power (51 Am Jur 526 at p. 529); therefore, the party claiming the exemption has the burden of proof (51 Am Jur 527 at p. 530), and the existence of a well-founded doubt of an exemption is fatal. (*Bank of Commerce vs. Tennessee*, 161 US 134.) It is also a general principle of law that a statute concerning a municipality (*City of Miami vs. Kayfetz*, 30 So. 2d 521; *Fisher vs. City of Pittsburgh*, 112 Atl. 2d 814) and a school district (*Madison County vs. School District #2*, 27 NW 2d 172) must be strictly construed, since they are both governmental subdivisions.

In conclusion, I find no well-founded doubt in this case. The legislature has granted an exemption

to co-operatives operating utilities under "arrangement" with the R. E. A. As previously discussed, this exemption is not expressed in as clear language as could be desired. However, I find that the legislature did intend such an exemption and it is obvious that none but co-operatives such as the Chugach Electric Association, Inc., and other co-operatives in a like position as Chugach Electric Association, Inc., could qualify.

The difficulty of the interpretation of the tax problem and the applicability of the exemption herein presented to the taxpayer and the courts is a classic example of the ever-increasing and growing need for the legislature to pass legislation creating better taxation laws.

As heretofore orally announced in open court, the motion to dismiss as to the Chugach Electric Association, Inc., is hereby granted.

Dated at Anchorage, Alaska, this 8th day of May, 1956.

/s/ J. L. McCARREY, JR.,  
U. S. District Judge.

Received May 9, 1956.

[Endorsed]: Filed May 9, 1956.

In the District Court for the District of Alaska,  
Third Division

Nos. A-10,369 and A-11,097

In the Matter of:

The Delinquent Tax Roll of the City of Anchorage  
for the year 1954.

In the Matter of:

The Application of the Anchorage Independent  
School District for an Order Directing Sale  
of All Properties Listed in the Delinquent Tax  
Roll of Said District for the Fiscal Years  
1951-1952, 1952-1953, 1953-1954, 1954-1955; Said  
Roll Being Known as the Delinquent Tax Roll  
of the Anchorage Independent School District  
for the Year 1955.

### JUDGMENT OF DISMISSAL

This matter having come before the Court upon the motion to consolidate and dismiss filed by the Chugach Electric Association, Inc., in the above-entitled proceeding, and this Court having heard oral argument by counsel for the respective parties, upon each and all of the grounds stated in said motion to dismiss, and this Court also having considered the written briefs filed by the respective parties through their counsel, in compliance with orders of this Court, and this Court being fully advised in the premises, does hereby find that said motion should be granted and said petitions and

each of them dismissed, upon the grounds and for the reasons set forth in an Opinion filed in the above-entitled proceeding on May 9, 1956;

Wherefore, It Is Ordered, Adjudged and Decreed:

1. That the Petition of the City of Anchorage, entitled, "In the Matter of the Delinquent Tax Roll of the City of Anchorage for the year 1954" being Cause No. A-10,369, be, and the same hereby is, dismissed, with prejudice, as to Chugach Electric Association, Inc.

2. That the Petition of the Anchorage Independent School District, entitled, "In the Matter of the Application of the Anchorage Independent School District for an Order Directing Sale of All Properties Listed in the Delinquent Tax Roll of said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955. Said Roll Being Known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955," being Cause No. A-11,097, be, and the same hereby is, dismissed, with prejudice, as to Chugach Electric Association, Inc.

3. That Chugach Electric Association, Inc., have and recover of the said petitioners its costs of these proceedings including an attorney's fee of Two Hundred Fifty Dollars (\$250.00).

Made and Ordered Entered at Anchorage, Alaska, this 12th day of June, 1956, at the hour of 10:14 a.m.

/s/ JOHN L. McCARREY, JR.,  
Judge of the District Court.



Approved as to form:

/s/ LYNN W. KIRKLAND,  
Attorney for City of  
Anchorage.

/s/ E. L. ARNELL,  
Attorney for Anchorage In-  
dependent School District.

Received June 11, 1956.

Entered June 12, 1956.

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[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

NOTICE OF APPEAL

To the Clerk of the District Court, Third Division,  
District of Alaska:

Sir:

Notice is hereby given that the City of Anchorage, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the District Court for the Third Division, District of Alaska, dismissing with prejudice as prayed for by Chugach Electric Association, Inc., the petition of the City of Anchorage for an order directing sale of real property listed in the delinquent tax roll for the City of Anchorage

for the year 1954, which order of dismissal was entered in No. A-10,396 on June 12, 1956.

/s/ JAMES M. FITZGERALD,  
Attorney for the Petitioner,  
City of Anchorage.

Received July 3, 1956.

[Endorsed]: Filed July 3, 1956.

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[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

(Consolidated)

### APPELLANT'S STATEMENT OF POINTS

The points upon which the appellant, City of Anchorage, will rely upon appeal are:

1. The District Court erred in dismissing the Supplemental Petition of the City of Anchorage.
2. The District Court erred in assuming that Chugach Electric Association is within the exemption provided under the Alaska Property Tax Act of 1949, as amended by Chapter 22, Session Laws of Alaska, 1953.
3. The District Court erred in finding that the Chugach Electric Association has been granted specific immunity from all municipal taxation by the Territorial Legislature.

4. The District Court erred in finding that the Alaska Property Tax of 1949 was a general codification under the taxing laws of the Territory of Alaska.

5. The District Court erred in finding that the Alaska Property Tax Act of 1949 restricted the taxing power of a municipality under other acts or statutes of the Territory of Alaska.

6. The District Court erred in finding that the classification exempting the property of associations operating utilities under arrangements with Rural Electrification Administration was a reasonable one.

/s/ JAMES M. FITZGERALD,  
Attorney for Appellant,  
City of Anchorage.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 6, 1956.

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[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

CLERK'S CERTIFICATE—ORIGINAL  
RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the United States Court of Appeals, Ninth Circuit, and of Rules 75(g)(o) of the Federal Rules of Civil Procedure, and of the designations of coun-

sel in causes Nos. A-10,396 and A-11,097, consolidated, I am transmitting herewith in separate volumes the Original Papers in my office dealing with the above-entitled actions or proceedings.

The papers herewith transmitted constitute the record on appeal in said actions from the judgment filed and entered in the above-entitled actions by the above-entitled Court on June 12, 1956, to the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Anchorage, Alaska, this 9th day of August, 1956.

/s/ WM. A. HILTON,  
Clerk.

cc: Mr. James M. Fitzgerald,  
Attorney, City of Anchorage,  
Anchorage, Alaska.

Mr. E. L. Arnell,  
Attorney at Law,  
Anchorage, Alaska.



[Endorsed]: No. 15231. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Municipal Corporation, Appellant, vs. Chugach Electric Association, Inc., Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed August 11, 1956.

Docketed: August 16, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals,  
Ninth Circuit

No. 15231

In the Matter of

The Delinquent Tax Roll of the City of Anchorage  
for the Year 1954.

No. 15232

In the Matter of

The Delinquent Tax Roll of the Anchorage Inde-  
pendent School District for the Year 1955.

### STIPULATION

Whereas, each of the above-entitled proceedings involves substantially the same issues of law and are based upon the same opinion rendered by Judge J. L. McCarrey, Jr., Judge of the District Court for the District of Alaska, Third Division, Territory of Alaska, and

Whereas, counsel for the respective parties deem the consolidation of said appeals to be advantageous to the various parties;

Now, Therefore, It Is Stipulated, by the undersigned that the above-entitled proceedings, No. 15231 and No. 15232, now pending before the above-entitled court, may, by order of said court, be consolidated for all purposes, by the entry of any Order of Consolidation which the court deems appropriate.

Dated at Anchorage, Alaska this 5th day of Sept., 1956.

/s/ E. L. ARNELL,

Attorney for Appellant, Anchorage Independent School District.

/s/ JAMES M. FITZGERALD,

Attorney for Appellant, City of Anchorage, Anchorage, Alaska.

/s/ EDGAR PAUL BOYKO,

Attorney for Appellee.

So Ordered.

/s/ WILLIAM DENMAN,

Chief Judge;

/s/ ALBERT LEE STEPHENS,

/s/ H. T. BONE,

United States Circuit Judges.

[Endorsed]: Filed September 7, 1956.





No. 15232

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United States  
Court of Appeals  
for the Ninth Circuit

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ANCHORAGE INDEPENDENT SCHOOL DISTRICT,

Appellant,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,

Appellee.

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Transcript of Record

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Appeal from the District Court  
for the District of Alaska,  
Third Division

FILED

NOV 14 1956



No. 15232

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**United States  
Court of Appeals**  
for the Ninth Circuit

---

ANCHORAGE INDEPENDENT SCHOOL DISTRICT,

Appellant,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,

Appellee.

---

**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Third Division**





## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

E. L. ARNELL,  
202 Turnagain Arms,  
Anchorage, Alaska,

Attorney for Appellant, Anchorage Independent School District.

EDGAR PAUL BOYKO,  
Turnagain Arms, 523 3rd Ave.,  
Anchorage, Alaska,

Attorney for Appellee.





In the District Court for the District of Alaska.  
Third Division  
No. A-11097

In the Matter of:

The Application of the Anchorage Independent School District for an Order Directing Sale of All Properties Listed in the Delinquent Tax Roll of Said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955, Said Roll Being Known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955.

### PETITION

Comes now the Anchorage Independent School District, a public and municipal corporation, existing under and by virtue of the laws of the Territory of Alaska, and by this petition respectfully reports to the court as follows:

#### I.

That your petition is a public and municipal corporation existing under and by virtue of the laws of the United States of America and the Territory of Alaska.

#### II.

That K. M. Lesh, who certified said roll, is the duly qualified and acting treasurer of said district.

#### III.

That the delinquent tax roll hereto attached, marked Exhibit "A," and hereby included by this

reference as a part of this petition, includes all real properties within the boundary of the Anchorage Independent School District upon which real property taxes are delinquent for the fiscal years commencing July 1st each year, namely 1951-1952, 1952-1953, 1953-1954, 1954-1955.

#### IV.

That said delinquent tax roll as heretofore referred to as Exhibit "A" was duly and regularly made up by the proper officers of the School Board of the Anchorage Independent School District, and by said treasurer certified in the manner required by law, and such certification was attested to in the manner required by law by K. M. Lesh, treasurer of said district; that pursuant to the resolutions of said Board, said roll was published in the Anchorage Daily News, a newspaper of general circulation, published in Anchorage, Alaska; that with said roll also published setting forth that such delinquent tax roll was open for public inspection in the district tax collector's office in the office of the Tax Assessor and Collector, Administration Building, West Hillcrest Drive, Anchorage, Alaska; that said roll, together with added official notice was published in such paper on April 18, April 25, May 2, May 9, and May 16, 1955; that proof of such publication is hereto attached and in this petition incorporated as petitioners' Exhibit "B."

#### V.

That there is annexed to this petition, as petitioners' Exhibit "A," the original delinquent tax

roll as certified on the 12th day of April, 1955, together with a certified copy of said roll; that said roll was prepared by the proper officers of said district according to law and includes delinquent taxes upon real property within the boundaries of the Anchorage Independent School District for the assessment years 1951-1952, 1952-1953, 1953-1954, 1954-1955; that said roll is known as the Delinquent Tax Roll of the Anchorage Independent School District for the year 1955; that said roll according to law, describes by appropriate legal description, the real property assessed, the period for which delinquent taxes are claimed, the amount of tax due, the penalty and interest assessed upon such delinquent taxes, and the name of the person to whom such property is assessed, if the name of the owner is known, and where the name of the owner is unknown, such fact is so stated.

## VI.

That said notice as referred to in paragraph IV hereof notifies all persons of delinquent property taxes due the Anchorage Independent School District; that said district by its Treasurer, would on the 24th day of June, 1955, at the hour of 10:00 a.m., or as soon thereafter as the same could be heard, present said delinquent tax roll in accordance with the provisions of Territorial law.

## VII.

That the delinquent taxes upon real property described in the accompanying tax roll have not been

paid, except those originally shown thereon and which, as appears thereby, have been stricken from said roll, are delinquent and now due, owing and unpaid to the Anchorage Independent School District together with penalties, interest and costs, as in said roll specified.

### VIII.

That this petition is presented to this Honorable Court under the provisions of Article 7, Sections 16-1-121, et seq., Alaska Compiled Laws Annotated 1949, Volume I.

Wherefore, the Anchorage Independent School District respectfully prays that the Court:

(1) Shall hear, pass upon and determine the legality of said delinquent tax roll and hear any objections thereto that may be presented against the validity of any tax penalty or interest assessed against any property listed in said roll.

(2) After hearing upon said roll, that the Court enter an order directing that the several parcels of real property listed in said delinquent tax roll be sold by the Anchorage Independent School District to satisfy and discharge the district's lien for taxes, penalties and interest thereon, and the costs of the adjustment of said roll, including the costs of this proceeding.

(3) That the court allow the district a reasonable attorney's fee to pay for the services of the



attorney representing said district in this proceeding.

(4) That the court grant to the petitioner herein such other and further relief as to the court may seem just and equitable in the premises.

/s/ E. H. ARNELL,  
Attorney for Petitioner.

/s/ EDWARD V. DAVIS,  
President.

Attest:

/s/ K. M. LESH,  
Treasurer.

Duly verified.

## EXHIBIT "A"

Delinquent Tax Roll of the Anchorage Independent School  
District for the Year 1955  
Chugach Electric

Page	Line	Description	Year	Tax	Penalty	Interest	Costs	Total Due
6	10	E 26.5' Lot 2 and E 26.5' L-11 Davis Subdivision .....	1955	6.69	1.00	.34	9.25	17.28
6	20	Lot 1 Delaney Sub. ....	1955	43.05	6.46	2.15	9.25	60.91
6	21	Lots 1, 6 and 7 Delaney Sub.....	1954	37.76	5.66	4.15	9.25	56.82
7	16	S $\frac{1}{2}$ 6A Block, East Addition.....	1955	2093.12	313.97	104.66	9.25	2521.00
7	17	S $\frac{1}{2}$ Block 6A, East Addition.....	1954	2228.11	334.22	245.09	9.25	2816.67
8	13	Lot 23 Eide Subdivision.....	1955	5.00	.75	.25	9.25	15.25
8	14	Lot 23 Eide Subdivision.....	1954	1.00	.60	.44	9.25	14.29
8	15	Lot 24 Eide Subdivision.....	1955	5.50	.83	.28	9.25	15.86
8	16	Lot 24 Eide Subdivision.....	1954	5.00	.75	.55	9.25	15.55
28	10	Lot 5 Spenard Industrial Development .....	1954	80.57	12.09	8.86	9.25	110.77

28	11	Lot 6 Spenard Industrial Development .....	1954	6.00	.90	.66	9.25	16.81
34	2	Beginning at the SW Corner of Lot 4 Block 1, Van Subdivision due South 126' to pt. of beginning; thence due S 126'; thence due E 140'; thence due N 126'; thence due W 140' to pt. of beginning.....	1955	4.00	.60	.20	9.25	14.05
34	3	Beginning at the SW Corner of Lot 4 Block 1, Vans Sub. due S 126' to point of beginning; thence due S 126'; thence due E 140'; thence due N 126'; thence due W 140'; to pt. of beginning .....	1954	12.52	1.88	1.38	9.25	25.03
47	1	Parcel 209' x 209' in NW ¼ Sec. 22 T13N R3W (1 acre) .....	1954	5.00	.75	.55	9.25	15.55
30	19	W 47' Lots 3 and 4 Block 18D Third Addition .....	1955	249.00	37.35	12.45	9.25	308.05

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

ORDER GRANTING APPLICATION  
AND AUTHORIZING SALE

The above-entitled matter, pursuant to the laws of the Territory of Alaska and the resolutions of the Board of the Anchorage Independent School District, having, on the 24th day of June, 1955, been presented to this Court at the hour of 10:00 a.m., and it appear from the records and files in this proceeding that no objections have been filed of record opposing the granting of this petition, except the objections of the Chugach Electric Association, Inc., and the Court, on said date, having heard the testimony of witnesses, and

It appearing from the petition herein that the Anchorage Independent School District is a municipal corporation, organized and existing by virtue of the laws of the United States of America and the Territory of Alaska, and is situated within the Third Judicial Division of said Territory and within the jurisdiction of this Court; and

It further appearing that said roll as presented includes delinquent real property taxes for the fiscal years 1951-1952, 1952-1953, 1953-1954, 1954-1955; and

It further appearing that said delinquent roll, filed in this proceeding, was made up in the manner required by law and the resolutions of said District; and

It further appearing that the Treasurer of said Board did endorse upon said roll a certificate, stat-



ing that the same was a true and correct roll of all delinquent taxes in the Anchorage Independent School District for the years designated; and

It further appearing that the original of said roll was filed in the office of the Tax Collector for the Anchorage Independent School District and at all times herein pertinent remained open to inspection by the public; and

It further appearing that the Tax Collector of the Anchorage Independent School District, under the direction of the School Board thereof, caused to be published in the Anchorage Daily News, a newspaper of general circulation, published in Anchorage, Alaska, once each week for a period of four successive weeks a notice, under the hand of the Treasurer of said District, said publication dates being April 18, 1955; April 25, 1955; May 2, 1955; May 9, 1955, and May 16, 1955; and

It further appearing that the notice and roll so published set forth the delinquent taxes, penalties and interest remaining unpaid upon real properties therein listed for the years designated; and

It further appearing that said notice so published did designate the 24th day of June, 1955, as the day and the time of 10:00 a.m. of said day as the hour when said roll, as prepared and published, was to be presented to this Court; and

It further appearing that the last day of publication was more than thirty days prior to the date specified for the filing of said roll in this Court; and

It further appearing that said notice so published did describe each tract of land upon which delinquent taxes remained unpaid, did state the amount of taxes, penalties and interest due thereon, and the name of the person to whom assessed, where such name was known and where the name of the owner was unknown, such fact is so stated; and

It further appearing that no person claiming to be the owner of any property listed in said roll has appeared in this proceeding to object to the legality of said roll or to the validity of any tax or assessment upon any property described in said roll, except Chugach Electric Association, Inc.; and

It further appearing to the Court that the taxes, penalties, interest and costs in said roll set forth have been legally assessed and are valid and unpaid; and

The Court being fully advised in the premises;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That all proceedings in the above-entitled matter are and they are hereby declared to be valid, provided, however, that hearing upon the objections of the Chugach Electric Association, Inc., be continued subject to further order of this Court.

2. That there be sold, according to law to satisfy and discharge the tax liens held by the Anchorage Independent School District and in payment of

penalties, interest, attorney's fees and all costs the property described in Exhibit A attached hereto and made a part hereof, except any properties listed on said exhibit in the name of Chugach Electric Association, Inc.

3. That a certified copy of this order shall be attached to this delinquent tax roll proceedings file and filed herein and become a part of the record hereof.

4. That the Anchorage Independent School District be, and it hereby is, awarded publication costs in the amount of \$6,290.00 for the first publication of said roll.

5. That the Anchorage Independent School District be, and it hereby is, awarded the sum of \$500.00 as and for attorney's fees incurred by said district in this proceeding.

6. That the Anchorage Independent School District be, and it hereby is, allowed to tax against the properties herein described increased costs to be incurred as required by law.

7. That all costs, attorney's fees and increased costs be, according to law, prorated among the properties herein ordered to be sold.

Done in open Court this 24th day of June, 1955.

/s/ JAMES L. McCARRY, JR.,  
District Judge.

[Endorsed]: Filed and entered June 24, 1955.

[Title of District Court and Cause.]

### MOTION TO DISMISS

Chugach Electric Association, Inc., an Alaskan corporation, and a party in interest herein, by Edgar Paul Boyko, its attorney, moves to dismiss the so-called Supplemental Petition for a Judgment and Order of Sale filed herein by the City of Anchorage, on the following grounds:

1. That this Honorable Court lacks jurisdiction to hear the same because the applicable statute under which this proceeding has been brought has not been complied with by the City of Anchorage in several respects, as more particularly set forth below.

2. That Article 7, Chapter 1, of Title 16 ACLA, 1949, does not authorize the filing of a supplemental delinquent tax roll and that the delinquent tax roll of the City of Anchorage for the year 1954 has been filed heretofore and was certified to be complete and a final Judgment and Order of Sale was issued thereon on October 29, 1954, in case No. A-10,396; and the said case has been closed.

3. That the records of this case show that publication of the Notice of Tax Sale required by statute in this proceeding was not completed until on or after December 28, 1954; that said notice, as published, states that the delinquent tax roll, or "supplemental" delinquent tax roll which is the subject matter of this proceeding will be presented to the



District Court for Judgment and Order of Sale on January 7, 1955; and said roll was in fact presented to this Honorable Court on said date; that the applicable statute and particularly Section 16-1-122, ACLA, 1949, requires that said roll shall be presented to the District Court for a Judgment and Order of Sale "on a certain day not less than thirty days after the completion of the publication"; that not more than ten days have elapsed between the date of completion of publication and the presentation of the roll to the Court on the date set forth in said notice; that for the reasons just stated, this Court lacks jurisdiction to proceed further in this case, at least until proper publication has been had and a proper date has been set for the presentation of the said roll.

4. That this motion is filed concurrently with, and supplementary to the written Objection to Tax and proposed Order of Sale filed herein on this day, for the purpose of enabling this Honorable Court to dispose of the issue of jurisdiction, as distinguished from the merits and points of substantive law raised in said objection.

/s/ EDGAR PAUL BOYKO,  
Attorney for Chugach Elec-  
tric Association, Inc.

Certificate of service attached.

[Endorsed]: Filed January 8, 1955.

In the District Court for the District of Alaska,  
Third Division, Anchorage, Alaska

No. A-10,396

In the Matter of:

The Delinquent Tax Roll of the City of Anchorage  
for the Year 1954

No. A-11,097

In the Matter of:

The Delinquent Tax Roll of the Anchorage Independent School District for the Year 1954, etc.

MOTION TO CONSOLIDATE  
AND TO DISMISS

Chugach Electric Association, Inc., a co-operative corporation of the Territory of Alaska, by Edgar Paul Boyko, its attorney, respectfully represents as follows:

1. That it is a party in interest to each of the above-entitled causes now pending before this Honorable Court and that both of said causes involve a common question of law, which is the subject matter of the Motion to Dismiss hereto subjoined.

2. That the cause of efficiency, economy and good procedure would be served, and the time of the Court and of the parties litigant would be conserved, if the above-entitled causes were to be consolidated, at least for the purpose of the hearing on the respective Motions to Dismiss.

3. That the above-entitled causes, and each of them, should be dismissed because the petition upon which each is based fails to state a claim against Chugach Electric Association, Inc., upon which relief can be granted, and, specifically, because the said Chugach Electric Association, Inc., is expressly exempt from taxation by either the City of Anchorage or the Anchorage Independent School District, by virtue of the provisions of Section 6(b) of Chapter 10, Session Laws of Alaska, 1949, as amended, supplemented and re-enacted by Section 3 of Chapter 33, Session Laws of Alaska, 1953, and for other reasons to be stated at the hearing hereof.

Wherefore, Chugach Electric Association, Inc., respectfully moves this Honorable Court as follows:

(a) To consolidate the above-entitled causes for the purpose of hearing of the subjoined Motions to Dismiss, and for such other purpose or purposes as to this Honorable Court may appear proper and just.

(b) To dismiss the above-entitled causes, and each of them, on the grounds hereinabove stated.

/s/ EDGAR PAUL BOYKO,

Attorney for Chugach Electric Association, Inc.

## NOTICE

To: John L. Rader, Esq., City Hall, Anchorage, Alaska, and E. L. Arnell, Esq., Turnagain Arms Apartments, Anchorage, Alaska, Attorneys for the above-named Petitioners.

Please Take Notice that the undersigned will bring the within Motion for consolidation and to dismiss on to hearing before the Honorable J. L. McCarrey, Jr., District Judge, in the District Courtroom, Federal Building, Anchorage, Alaska, on Tuesday, August 2, 1955, at 3:00 o'clock in the afternoon of said day, or as soon thereafter as counsel may be heard.

Said motion will be made and heard upon this Notice and upon the pleadings, papers, records and files in the above-entitled causes.

/s/ EDGAR PAUL BOYKO,  
Attorney for Chugach Electric Association, Inc.

Certificate of service attached.

Received July 5, 1955.

[Endorsed]: Filed July 5, 1955.



[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

M.O. CONSOLIDATION FOR PURPOSES OF  
ARGUMENT ON MOTION TO DISMISS  
ONLY

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey Jr., District Judge, the following proceedings were had, to wit:

Now at this time upon motion of Edgar P. Boyko, counsel for Chugach Electric Co.; John L. Rader, for and in behalf of the City of Anchorage, and Edward L. Arnell for and in behalf of the Anchorage Independent School District, not objecting,

It Is Ordered that causes No. A-10,396, entitled In the Matter of the Delinquent Tax Roll of the City of Anchorage for the Year 1954, and No. A-11,097, entitled In the Matter of the Application of the Anchorage Independent School District for an Order Directing Sale of All Properties Listed in the Delinquent Tax Roll of said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955, said Roll being known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955, be and they are hereby consolidated for purposes of arguments on motion to dismiss as to Chugach Electric Association only.

Entered September 1, 1955.

*Anchorage Independent School District*

In the District Court for the District  
of Alaska, Third Division

No. A-10,396

In the Matter of

The Delinquent Tax Roll of the City of Anchorage for the Year 1954.

No. A-11,097

In the Matter of

The Application of the Anchorage Independent School District for an Order Directing Sale of All Properties Listed in the Delinquent Tax Roll of Said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955; Said Roll Being Known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955.

(Consolidated)

### OPINION

John Rader for the Petitioner City of Anchorage;  
E. L. Arnell for the Petitioner Anchorage Independent School District; Edgar P. Boyko for Chugach Electric Association, Inc., taxpayer.

These two cases have been consolidated because of a common question of law for the sole purpose of determining a motion to dismiss.

The City of Anchorage, a municipal corporation, in cause No. A-10,396, petitioned the court to foreclose its tax lien for the year 1954, and the Anchorage Independent School District, in cause No. A-11,097, petitioned the court to foreclose its tax liens for the years 1951-1952, 1952-1953, 1953-1954, 1954-1955.

The Chugach Electric Association, Inc., is an Alaskan non-profit co-operative association, organized for the purpose of participating as a co-operative under the Rural Electrification Administration Act of 1936, as amended. (7 USCA 901, et seq.)

While the Chugach Electric Association, Inc., supplies electricity and electrical service to rural areas on monies borrowed from the Rural Electrification Administration, the generating plant itself and accompanying facilities are located inside the corporate limits of the City of Anchorage, and were constructed upon leased ground, within the yards of the Alaska Railroad, in a joint participation undertaking with the Alaska Railroad. The latter is a government-owned railroad that operates under the direction and by virtue of congressional authority granted to the Department of the Interior. (48 USCA 301, et seq.)

A portion of the electricity used by the co-operative is generated within the yards of the Alaska Railroad (*supra*) and is transmitted over lines into the rural areas served by the co-operative. The gen-

erating plant of the co-operative, and a portion of the co-operative transmission lines are likewise located within the boundaries of the Anchorage School District.

In the motion to dismiss, the movant taxpayer, Chugach Electric Association, Inc., originally based its motion upon several procedural defects, and other grounds hereinafter designated. However, these alleged procedural defects have now been waived upon stipulation by the co-operative.

The remaining grounds upon which the motion to dismiss is based are as follows: (1) The co-operative is a governmental instrumentality and, therefore, is not taxable; (2) Its property is located wholly within the Alaska Railroad Reserve with title being in the Government and, therefore, is not taxable; (3) The co-operative has been granted specific immunity from taxation by the Territorial Legislature.

Only point number 3 will be considered, since a favorable determination for the movant on any one of the three points would be controlling.

In 1949, the Territorial Legislature passed an act entitled "Alaska Property Tax Act" and provided, among others, the following exemptions: "The property of the United States, of the Territory, and of any municipal corporation, independent school district, incorporated school district, public utility district and association operating utilities under arrangements with the Rural Electrification Adminis-



tration, shall be exempt hereunder." (Emphasis supplied.) (Chap. 10, Session Laws of Alaska, 1949, Sec. 6(b).)

In 1953, the legislature repealed the "Alaska Property Tax Act." (Chap. 22, Session Laws of Alaska, 1953.)

The same legislature passed a tax act "authorizing and empowering cities, municipalities, school districts, public utility districts and other taxing units to classify property for the purpose of taxation and authorizing the granting of exemptions to certain classes of property; making exemptions granted and classifications made under Chapter 10, Session Laws of Alaska, 1949, binding upon such taxing units and declaring an emergency." (Emphasis supplied.) (See introductory clause, Chapter 33, Session Laws of Alaska, 1953.)

Section 3 of the same act passed by the 1953 legislature concerning taxation provides as follows: "All exemptions granted in whole or in part, and all classifications heretofore made under the provisions of Section 6, Chap. 10, Session Laws of Alaska, 1949, shall remain in full force and effect upon the terms and for the periods granted, and shall be binding upon the Territory, and all cities, municipalities, school districts, public utility districts and other taxing units in which the property which is the subject of classification or exemption is situated, and the exemptions granted or classifications so made shall apply to all taxes levied and as-

essed by the city, municipality, school district, public utility district or other taxing units where the property is situated, as fully as though they had been granted or made under the provisions of this act. The purpose and intent of this section is to carry into practical effect all classifications made and exemptions granted under the provisions of Chap. 10, Session Laws of Alaska, 1949." (Emphasis supplied.)

"All acts and parts of acts in conflict herewith are hereby repealed to the extent of the conflict." (See Sections 3 and 5, Chap. 33, Session Laws of Alaska, 1953.)

The City of Anchorage opposes point number 3 principally on the basis of:

- a. Statutory construction;
- b. The exemption claimed is in violation of the Territorial Organic Act;
- c. The exemption purportedly granted to an association "\* \* \* under arrangement with the Rural Electrification Administration \* \* \*" is invalid.

The Anchorage Independent School District opposes the same point upon the bases of:

- a. Statutory construction;
- b. Legislative intent;
- c. The claimed exemptions would not apply to a tax not asserted.

Prior to the Alaska Property Tax Act, the Independent School District of the Territory of Alaska levied and collected taxes under legislative

authorization set forth in 37-3-23 ACLA, 1949, and 37-3-53, which, among other things, denominated exemptions of the school tax, while the municipalities levied and collected taxes and gave exemptions through the legislative authorization of 16-1-35(g), as amended, and 16-4-1 ACLA, 1949.

The Alaska Property Tax Act of 1949 (*supra*) purports to be a general codification of the tax law in the Territory of Alaska and clearly enumerates the exemptions (*supra*). I do not believe that the word "codification" can be considered as being used in a "strained" sense, for, in Section 3, the law states: "\* \* \* there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory \* \* \*" (Emphasis supplied.) Then in Section 4 of the Act is found this language: "The tax levied under the provisions of Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district \* \* \*" and "All of the tax levied under this Act which is so collected shall be remitted to such municipalities or school districts as follows: \* \* \*" (Emphasis supplied.)

Counsel for the petitioners have urged upon the court the theory that the legislature did not intend, by Chapter 10 of the 1949 Session Laws, to limit the general taxing power of the municipalities,

school districts, etc. Their arguments fall under their own weight since it cannot be said that the legislature intended that the 1% authorized by this act would be in addition to that authorized to the municipalities and independent school districts enumerated above. Thus, the only reasonable interpretation which one can give to the intent of the legislature in passing Chapter 10 of the 1949 Session Laws is that it intended to codify, so to speak, all of the basic taxing laws into one general act, which they named the "Alaska Property Tax Act," wherein they granted certain exemptions. To give any other interpretation would result in the property of an association "\* \* \* operating utilities under arrangement with the Rural Electrification Administration \* \* \*" being taxed by the Territory of Alaska outside of any municipality, independent school district, incorporated school district or public utility district; yet, at the same time, such an "association" could not be taxed within the boundaries of the foregoing taxing entities.

It is true that the statutes under which taxes are levied and collected by the municipalities and the school districts here in the Territory of Alaska are not referred to specifically by a cross reference. However, when all of the acts are viewed as a whole and construed together, the legislature's intent is clear.

I am of the opinion that Chap. 10 of the Session Laws of Alaska, 1949, is legislation passed under the board, general taxing powers of the sovereignty



of the Territory of Alaska, and while I find that the execption given to asociations operating utilities under an arrangement with the R. E. A. is somewhat broad, loose, and a general term not readily or easily defined, I find that this exemption does apply to the movant, Chugach Electric Association, Inc.

Counsel for the petitioner, City of Anchorage, urges that since the Rural Electrification Administration is not limited under the federal law creating it to “\* \* \* the lending of funds to co-operatives,” such an exemption as provided in the laws of the Territory of Alaska could not “\* \* \* be applied with fairness because of the indefiniteness of the term.” (See City petitioner’s brief under Section 4 at page 8.) I cannot accept this as a logical argument for the reason that the tax exemption being considered in this case is limited to those as-sociations which operate “utilities” under an “arrangement” with the R. E. A.; hence, the possible vested authority of R. E. A. to perform another function other than to supply utilities is immaterial in the final analysis and determination of the case before the court.

I find such a classification of the property exempt under the law here in question to be a reasonable one, and should the municipalities, independent school districts, etc., of the Territory of Alaska be aggrieved by such a law covering this exemption, their recourse is with the legislature.

The petitioners make much of the case of the Inter-City Rural Electric Co-operative Corporation vs. Reeves, Commissioner of Revenue, et al., Court of Appeals, Kentucky, 1943, 171 SW 2d, 978, in which case the court held that an exemption under the Kentucky Constitution which required “\* \* \* and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws,” was held to be unconstitutional. I am not greatly moved by this argument for the reason that the Alaska Organic Act requires only that “\* \* \* all taxes shall be uniform upon the same class of subjects” (supra). A comparison of the two acts distinguishes the applicability of the petitioners’ argument, since the constitutional requirements are different. I am of the opinion that the requirement of the Kentucky Constitution in determining the constitutionality of a tax law is that the tax must be assessed uniformly on the same class of property, and, therefore, the only way the property could be exempt would be if the co-operative were considered to own public property, which it is obvious that it did not and, thus, they were liable for taxes. In the Organic Act requirement of the Territory of Alaska is the provision that all persons of a certain class must be treated uniformly. In the case before the court, in referring to “the same class of subjects” (supra), the language of the exemption statute reads: “\* \* \* arrangement with the Rural Electrification Administration \* \* \*” (supra). The choice of this language

is unfortunate; however, it would appear to be a reasonable classification; thus, all co-operatives having "arrangements" with the Rural Electrification Administration must be treated alike.

The petitioners argue in their briefs that it is " \* \* \* a fundamental rule of statutory construction that any enactment must be construed in its entirety, and that any purpose or intent of the legislature must be extracted from all of the provisions, rather than from a single, isolated section." (Page 5 of School District brief.) This I accept as a legal, cardinal principle of statutory construction. (U. S. vs. Alpers (1950), 338 US 680; Great Northern Rail. Co. vs. U. S. (1942), 315 US 262.)

Points of law which I have considered in the determination of this problem are: There is a presumption against the surrender of taxing power (51 Am Jur 526 at p. 529); therefore, the party claiming the exemption has the burden of proof (51 Am Jur 527 at p. 530), and the existence of a well-founded doubt of an exemption is fatal. (Bank of Commerce vs. Tennessee, 161 US 134.) It is also a general principle of law that a statute concerning a municipality (City of Miami vs. Kayfetz, 30 So. 2d 521; Fisher vs. City of Pittsburgh, 112 Atl. 2d 814) and a school district (Madison County vs. School District #2, 27 NW 2d 172) must be strictly construed, since they are both governmental subdivisions.

In conclusion, I find no well-founded doubt in this case. The legislature has granted an exemption

to co-operatives operating utilities under "arrangement" with the R. E. A. As previously discussed, this exemption is not expressed in as clear language as could be desired. However, I find that the legislature did intend such an exemption and it is obvious that none but co-operatives such as the Chugach Electric Association, Inc., and other co-operatives in a like position as Chugach Electric Association, Inc., could qualify.

The difficulty of the interpretation of the tax problem and the applicability of the exemption herein presented to the taxpayer and the courts is a classic example of the ever-increasing and growing need for the legislature to pass legislation creating better taxation laws.

As heretofore orally announced in open court, the motion to dismiss as to the Chugach Electric Association, Inc., is hereby granted.

Dated at Anchorage, Alaska, this 8th day of May, 1956.

/s/ J. L. McCARREY, JR.,  
U. S. District Judge.

Received May 9, 1956.

[Endorsed]: Filed May 9, 1956.



In the District Court for the District of Alaska,  
Third Division

No. A-10,396

In the Matter of

The Delinquent Tax Roll of the City of Anchorage  
for the year 1954.

No. A-11,097

In the Matter of

The Application of the Anchorage Independent  
School District for an Order Directing Sale of  
All Properties Listed in the Delinquent Tax  
Roll of Said District for the Fiscal Years 1951-  
1952, 1952-1953, 1953-1954, 1954-1955; Said Roll  
Being Known as the Delinquent Tax Roll of the  
Anchorage Independent School District for the  
Year 1955.

### JUDGMENT OF DISMISSAL

This matter having come before the Court upon  
the motion to consolidate and dismiss filed by the  
Chugach Electric Association, Inc., in the above-  
entitled proceeding, and this Court having heard  
oral argument by counsel for the respective parties,  
upon each and all of the grounds stated in said  
motion to dismiss, and this Court also having con-  
sidered the written briefs filed by the respective par-  
ties through their counsel, in compliance with orders

of this Court, and this Court being fully advised in the premises, does hereby find that said motion should be granted and said petitions and each of them dismissed, upon the grounds and for the reasons set forth in an Opinion filed in the above-entitled proceeding on May 9, 1956;

Wherefore, It Is Ordered, Adjudged and Decreed:

1. That the Petition of the City of Anchorage, entitled, "In the Matter of the Delinquent Tax Roll of the City of Anchorage for the Year 1954," being Cause No. A-10,396, be, and the same hereby is, dismissed, with prejudice, as to Chugach Electric Association, Inc.

2. That the Petition of the Anchorage Independent School District, entitled, "In the Matter of the Application of the Anchorage Independent School District for an Order Directing Sale of All Properties Listed in the Delinquent Tax Roll of Said District for the Fiscal Years 1951-1952, 1952-1953, 1953-1954, 1954-1955; Said Roll Being Known as the Delinquent Tax Roll of the Anchorage Independent School District for the Year 1955," being Cause No. A-11,097, be, and the same hereby is, dismissed, with prejudice, as to Chugach Electric Association, Inc.

3. That Chugach Electric Association, Inc., have and recover of the said petitioners its costs of these proceedings including an attorney's fee of Two Hundred Fifty Dollars (\$250.00).

Made and Ordered Entered at Anchorage, Alaska,  
this 12th day of June, 1956, at the hour of 10:14  
a.m.

/s/ J. L. McCARREY JR.,  
Judge of the District Court.

Approved as to form:

/s/ LYNN W. KIRKLAND,  
Attorney for  
City of Anchorage.

/s/ E. L. ARNELL,  
Attorney for Anchorage Inde-  
pendent School District.

[Endorsed]: Filed and entered June 12, 1956.

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[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

### NOTICE OF APPEAL

Notice is hereby given that the Anchorage Independent School District, petitioner above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the District Court for the Third Division, District of Alaska, dismissing, with prejudice, as prayed for by Chugach Electric Association, Inc., the petition of the Anchorage Independent School District for an order directing sale of real property listed in the delinquent tax roll for the Anchorage Independent

School District for the year 1954, which order of dismissal was signed and entered in the above-numbered cases on June 12, 1956.

/s/ E. L. ARNELL,  
Attorney for Petitioner, Anchorage Independent  
School District.

Service of copy acknowledged.

[Endorsed]: Filed July 9, 1956.

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[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097 (Consolidated)

### APPELLANT'S STATEMENT OF POINTS

The points upon which the Appellant will rely, upon appeal, are:

1. The Court erred in ruling that the Alaska Property Tax of one per cent (1%) was not, in fact, and was not intended by the Legislature to be, in addition to the taxes, Appellant, by law, is otherwise authorized to collect.
2. The Court erred in ruling that the exemption provisions of the Alaska Property Tax Act, Chapter 10, Section 6(b), Session Laws of Alaska, 1949, as preserved by the provisions of Chapter 22, Session Laws of Alaska, 1953, are applicable to the taxes levied by Appellant.



3. The Court erred in granting to Appellee judgment of dismissal, for the reason that said judgment is not supported by evidence establishing Appellee's compliance with the provisions of Chapter 33, Session Laws of Alaska, 1953.

4. The Court erred in ruling that Appellee (Chugach Electric Association, Inc.) is exempt from the payment of taxes levied by the Appellant.

5. The Judgment of Dismissal entered by the Court in the above-entitled proceedings is contrary to law.

Dated at Anchorage, Alaska, this 3rd day of August, 1956.

/s/ E. L. ARNELL,  
Attorney for Appellant, Anchorage Independent  
School District.

Service of copy acknowledged.

[Endorsed]: Filed August 3, 1956.

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[Title of District Court and Cause.]

Nos. A-10,396 and A-11,097

CLERK'S CERTIFICATE—  
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the United States Court of Appeals, Ninth

Circuit, and of Rules 75(g)(o) of the Federal Rules of Civil Procedure, and of the designations of counsel in Causes No. A-10,396 and A-11,097, consolidated, I am transmitting herewith in separate volumes the Original Papers in my office dealing with the above-entitled actions or proceedings.

The papers herewith transmitted constitute the record on appeal in said actions from the judgment filed and entered in the above-entitled actions by the above-entitled Court on June 12, 1956, to the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Anchorage, Alaska, this 9th day of August, 1956.

/s/ WM. A. HILTON,  
Clerk.

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[Endorsed]: No. 15232. United States Court of Appeals for the Ninth Circuit. Anchorage Independent School District, Appellant, vs. Chugach Electric Association, Inc., Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: August 11, 1956.

Docketed: August 16, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals,  
Ninth Circuit

No. 15231

In the Matter of

The Delinquent Tax Roll of the City of Anchorage  
for the Year 1954.

No. 15232

In the Matter of

The Delinquent Tax Roll of the Anchorage Inde-  
pendent School District for the Year 1955.

### STIPULATION

Whereas, each of the above-entitled proceedings involves substantially the same issues of law and are based upon the same opinion rendered by Judge J. L. McCarrey, Jr., Judge of the District Court for the District of Alaska, Third Division, Territory of Alaska, and

Whereas, counsel for the respective parties deem the consolidation of said appeals to be advantageous to the various parties;

Now, Therefore, It Is Stipulated, by the undersigned that the above-entitled proceedings, No. 15231 and No. 15232, now pending before the above-entitled court, may, by order of said court, be consolidated for all purposes, by the entry of any Order of Consolidation which the court deems appropriate.

Dated at Anchorage, Alaska this 5th day of Sept., 1956.

/s/ E. L. ARNELL,  
Attorney for Appellant, Anchorage Independent  
School District.

/s/ JAMES M. FITZGERALD,  
Attorney for Appellant, City of Anchorage, An-  
chorage, Alaska.

/s/ EDGAR PAUL BOYKO,  
Attorney for Appellee.

So Ordered.

/s/ WILLIAM DENMAN,  
Chief Judge;

/s/ ALBERT LEE STEPHENS,

/s/ H. T. BONE,  
United States Circuit Judges.

[Endorsed]: Filed September 7, 1956.



Nos. 15,231 and 15,232

IN THE  
United States Court of Appeals  
For the Ninth Circuit

CITY OF ANCHORAGE, a Municipal  
Corporation, *Appellant,*

vs.

CHUGACH ELECTRIC ASSOCIATION,  
INC., *Appellee.*

No. 15,231

ANCHORAGE INDEPENDENT SCHOOL DIS-  
TRICT, *Appellant,*

vs.

CHUGACH ELECTRIC ASSOCIATION,  
INC., *Appellee.*

No. 15,232

Appeal from the District Court for the District of Alaska,  
Third Division.

BRIEF FOR APPELLANTS  
CITY OF ANCHORAGE AND ANCHORAGE  
INDEPENDENT SCHOOL DISTRICT.

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FILED

JAN 29 1957

PAUL P. O'BRIEN, CLERK



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**BRIEF FOR APPELLANTS**  
**CITY OF ANCHORAGE AND ANCHORAGE**  
**INDEPENDENT SCHOOL DISTRICT.**

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**I.**

**JURISDICTION.**

Since the identical issue has been raised in both cases and both taxing units appeal from a common

judgment, the briefs of the City of Anchorage and the Anchorage Independent School District have been consolidated.

This is an appeal taken from a final judgment in favor of the Appellee, filed and entered in the District Court for the Territory of Alaska, Third Judicial Division, on the 12th day of June, 1956.

The District Court had jurisdiction in this proceeding by virtue of the provisions of Sections 53-1-1, 53-2-1, 53-2-4, 16-1-126 and 37-3-54, Alaska Compiled Laws, Annotated, 1949, and 48 U.S.C.A., Section 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the United States Code (as amended October 31, 1951, c. 655, Sec. 48, 65 Stat. 726). This appeal is governed by Section 1294 of Title 28 of the United States Code (June 25, 1948, c. 646, 62 Stat. 930, as amended Oct. 31, 1951, 65 Stat. 727).

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## II.

### **STATEMENT OF FACT.**

#### **CITY OF ANCHORAGE.**

The City of Anchorage is a municipal corporation of the first class, organized under and by virtue of the laws of the Territory of Alaska.

Chugach Electric Association, Inc., is a cooperative, organized under and by virtue of the laws of the Ter-



ritory of Alaska for the purpose of furnishing electrical energy to its members.

In 1954, the City assessed and levied property taxes against certain property of the Chugach Electric Association. The property of the Association taxed by the City was situated within the municipal boundaries. The taxes were not paid and became delinquent. The City then undertook to enforce collection of the tax in the usual manner. The laws of the Territory of Alaska provide for collection of delinquent taxes substantially as follows:

A delinquent tax roll is prepared by the municipal clerk, which contains a list of the properties upon which taxes have been levied and remain unpaid. The tax roll includes the name of the owner, if known, and sets forth the amount of the tax against each parcel of property, together with the penalty and interest accruing thereon and the period of delinquency.

The delinquent tax roll is presented to a District Court for the Territory of Alaska, and a hearing is held, after which, the Court, in the usual course, enters judgment and orders the property sold at tax sale (16-1-22, A.C.L.A., 1949).

The City Clerk-Treasurer for Anchorage prepared the delinquent tax roll for 1954, and included in a supplement thereto certain properties of the Chugach Electric Association. These properties include an interest in an electrical generating plant which is located upon the railroad reserve owned by the United States through its agency, the Alaska Railroad (TR-15231

p. 9). The delinquent tax roll and its supplement were presented to the District Court with a petition praying for judgment and for order of sale (District Court No. A-10,396) (TR-15231 pp. 10-14). After a hearing, the District Court entered judgment and ordered sale of the property.

Chugach Electric Association then filed a motion to dismiss the petition and the order of sale affecting its properties. Several separate and distinct objections to the municipal tax were raised by the Association.

Taxes had also been levied by the Anchorage Independent School District on certain Chugach Electric Association properties situate outside the city boundaries. Substantially, the same objections were raised to the taxes levied by the Anchorage Independent School District (TR-15232 pp. 16-17).

The District Court ordered the two cases consolidated for the purpose of determining the motions to dismiss (TR-15231 p. 19).

Arguments were presented to the Court on behalf of the respective parties, and briefs were prepared and submitted. No evidence was heard. The Honorable J. L. McCarrey, Jr., Judge of the District Court for the Territory of Alaska, Third Division, rendered a written opinion.

The judge stated, in his opinion, that the Chugach Electric Association relied upon three specific grounds in support of its motion to dismiss. The bases for the motion, according to the District Judge, were:

1. The cooperative is a governmental instrumentality and therefore is not taxable.
2. Its property is located wholly within the Alaska Railroad Reserve, with title being in the government, and, therefore, is not taxable.
3. The cooperative has been granted specific immunity from tax action by the Territorial Legislature (TR-15231 p. 22).

The District Court chose to decide the motion on one ground only. It found that the Chugach Electric Association had been granted immunity from municipal taxation by statutes of the Territory of Alaska. Accordingly, the petition of the City of Anchorage (TR-15231 pp. 3-6), and the petition of the Anchorage Independent School District (TR-15232 pp. 3-7) were dismissed with prejudice (TR-15231 p. 32).

The City of Anchorage has taken an appeal from the final judgment of dismissal (Court of Appeals No. 15231), and the Anchorage Independent School District has done likewise (Court of Appeals No. 15232).

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#### **ANCHORAGE INDEPENDENT SCHOOL DISTRICT.**

The Appellant, Anchorage Independent School District, is a public corporation, organized under appropriate laws of the Territory of Alaska, and, in conjunction with the Department of Education of said Territory, maintains a school system in the Anchorage area.

In pursuance of authorized statutory proceedings, the Appellant, on June 24, 1955, filed, in the District Court for the District of Alaska, a petition and delinquent tax roll, seeking an order directing that all properties listed in such roll be sold to satisfy and discharge Appellant's tax liens (TR-15232 pp. 3-7). Included in the roll so filed were Appellee's real properties upon which taxes had been levied but not paid (TR-15232 pp. 8-9). At the hearing upon Appellant's petition, the Court signed an order (TR-15232 pp. 10-13) authorizing Appellant to sell, according to law, all listed properties for delinquent, unpaid real property taxes. By such order, hearing upon Appellee's objections was continued for such further proceedings as the Court might direct (TR-15232 p. 12).

Thereafter, on July 5, 1955, the Appellee filed its motion (TR-15232 pp. 16-17) to consolidate and to dismiss Appellant's petition. All parties having been heard in arguments relating to such motion, the Court, on September 1, 1955, by minute order (TR-15232 p. 19) granted Appellee's request for consolidation of Appellant's petition with the petition of the City of Anchorage (TR-15231 p. 19). Following oral argument and submission of written briefs by the respective parties, the Court, on May 9, 1956, filed its opinion (TR-15232 pp. 20-30), wherein Appellant's application to sell Appellee's property was denied and dismissed with prejudice. On June 12, 1956, formal judgment of Dismissal (TR-15232 pp. 31-32) was entered.

Following such dismissal, Appellant filed its Notice of Appeal (TR-15232 pp. 34-55) on July 9, 1956.



## III.

**STATEMENT OF POINTS RELIED ON  
BY CITY OF ANCHORAGE.**

The points upon which the Appellant, City of Anchorage, will rely upon appeal are:

1. The District Court erred in dismissing the Supplemental Petition of the City of Anchorage.
2. The District Court erred in assuming that Chugach Electric Association is within the exemption provided under the Alaska Property Tax Act of 1949, as amended by Chapter 22, Session Laws of Alaska, 1953.
3. The District Court erred in finding that the Chugach Electric Association has been granted specific immunity from all municipal taxation by the Territorial Legislature.
4. The District Court erred in finding that the Alaska Property Tax Act of 1949 was a general codification under the taxing laws of the Territory of Alaska.
5. The District Court erred in finding that the Alaska Property Tax Act of 1949 restricted the taxing power of a municipality under other acts or statutes of the Territory of Alaska.
6. The District Court erred in finding that the classification exempting the property of associations operating utilities under arrangements with Rural Electrification Administration was a reasonable one.

**STATEMENT OF POINTS RELIED ON BY ANCHORAGE  
INDEPENDENT SCHOOL DISTRICT.**

The points upon which the Appellant, Anchorage Independent School District, will rely, upon appeal, are:

1. The Court erred in ruling that the Alaska Property Tax of one per cent (1%) was not, in fact, and was not intended by the Legislature to be, in addition to the taxes, Appellant, by law, is otherwise authorized to collect.
2. The Court erred in ruling that the exemption provisions of the Alaska Property Tax Act, Chapter 10, Section 6(b), Session Laws of Alaska, 1949, as preserved by the provisions of Chapter 22, Session Laws of Alaska, 1953, are applicable to the taxes levied by Appellant.
3. The Court erred in granting to Appellee judgment of dismissal, for the reason that said judgment is not supported by evidence establishing Appellee's compliance with the provisions of Chapter 33, Session Laws of Alaska, 1953.
4. The Court erred in ruling that Appellee (Chugach Electric Association, Inc.) is exempt from the payment of taxes levied by the Appellant.
5. The Judgment of Dismissal entered by the Court in the above entitled proceedings is contrary to law.

## ARGUMENT I.

THE DISTRICT COURT COMMITTED ERROR IN RULING THAT THE ALASKA PROPERTY TAX OF ONE PERCENT WAS NOT IN FACT AND WAS NOT INTENDED TO BE IN ADDITION TO OTHER TAXES WHICH APPELLANTS BY LAW ARE AUTHORIZED TO LEVY AND COLLECT. THE ALASKA PROPERTY TAX ACT WAS NOT INTENDED TO BE A CODIFICATION OF ALL TAXING STATUTES WITHIN THE TERRITORY OF ALASKA.

The District Court for the Third Division, District of Alaska, has found that the Alaska Property Tax Act (Chapter 10, SLA, 1949) accomplished a codification of all the taxing statutes in Alaska into one basic Act. The Court has, therefore, concluded that the tax exemptions contained in the Alaska Property Tax Act apply to all taxing statutes in force within the Territory of Alaska.

In order to adequately present and to illuminate the issues at hand, it is necessary to review the history of the taxing statutes involved. In 1904 the Congress of the United States authorized and provided that municipal corporations of the Territory of Alaska should have certain specific taxing power. This taxing power was conferred by Congress upon the municipalities by the Act of April 28, 1904, 33 Stats. 529. The purpose of the Act was to amend and codify the laws relating to municipal corporations in the District of Alaska. Section 4, Subsection 9, of the Act specifically authorized the following taxing power:

“Ninth: To assess, levy and collect a general tax for school and municipal purposes, not to exceed two percentum of the assessed valuation, upon all real and personal property, and to de-

clare the same a lien upon such property and to enforce the collection of such lien by foreclosure, levy, distress, and sale; *Provided*, however, that all property belonging to the municipality, all property used exclusively for religious, educational, and charitable purposes, and the household furniture of the head of a family or a householder not exceeding two hundred dollars in value shall be exempt from such tax; *Provided*, further, that the laws exempting certain property from levy and sale on execution shall not apply to said taxes or the collection of the same."

It may be observed that Congress empowered municipalities to tax all real and personal property at two percent of its assessed valuation. The purpose of this taxing power was to obtain revenue for the benefit of schools and the municipalities of Alaska. The following classes of property were exempt from the tax:

1. Municipal property.
2. Property used exclusively for religious, educational and charitable purposes.
3. Household furniture of the head of a family up to \$200 in value.

In 1912, Congress enacted an Organic Act for the organization of the Territory of Alaska. This was the Act of August 24, 1912, 37 Stats. 512. Two taxing authorities were contemplated under the Organic Act. The Territory of Alaska was authorized to place a tax of one percent of the assessed valuation on property located within the Territory. The municipalities of the Territory were authorized to place a tax of two



percent of the assessed valuation on property located within the municipal boundaries.

The Organic Act, in substance, empowered the Territory of Alaska to levy a general property tax of one percent on all property within the Territory, while municipalities were authorized to levy an additional two percent tax on all property located within the town boundaries.

The first compilation of the Laws of Alaska was adopted in 1913. Statutory authority providing for the general tax for school and municipal purposes is found in Section 627 of the Compilation of 1913. Section 627, CLA 1913, is identical with Subsection 9 of the Act of 1904.

The general tax for school and municipal purposes was again enacted by the Legislature of Alaska, Chapter 97 of the Session Laws of 1923. The taxing power remained unchanged, and the wording of Chapter 97, SLA 1923, is identical with the original authority as it first appeared in the Act of 1904 (33 Stats. 529) and again in Chapter 627, CLA 1913.

The first amendment in the general tax for school and municipal purposes was enacted by the Legislature of the Territory of Alaska in 1929. Chapter 116, SLA 1929, added a new exemption which excluded monies on deposit from the imposition of the tax.

In 1931 the Legislature of the Territory enacted Chapter 33, SLA 1931, for the purpose of amending the general tax for school and municipal purposes to

provide for a new exemption from the tax of property owned by veterans' organizations and their auxiliaries.

The Laws of Alaska were again compiled in 1933. In the 1933 compilation, the general tax for school and municipal purposes is provided for in Section 2383. The taxing power remained unchanged, however, and the wording of Section 2383 is identical with Chapter 33, SLA 1931.

In 1948, the Congress amended the Organic Act of 1912 by increasing the authorized two percent tax for general school and municipal purposes on property within municipalities to a three percent tax on such property. 48 USCA 44, 62 Stat. 302.

“No incorporated town or municipality shall levy any tax, for any purpose, in excess of 3 per centum of the assessed valuation of property within the town in any one year.”

The Alaska Compiled Laws Annotated were adopted in 1949. Section 16-1-35 (9) of ACLA 1949 contained the taxing power for the general tax for school and municipal purposes. This statute is identical in form and substance to Section 2383 of the 1933 CLA.

The power of school districts to levy and collect local taxes is derived from municipal taxing statutes. Chapter 77, SLA 1935 authorized school districts to prepare a budget to determine the amount of funds necessary to operate for the following year. The school district budget is then presented to the city council for approval. The city council then appropriates

revenue from its general funds to meet its proportionate share of the budget. The school district is then authorized to levy a tax within the remainder of the district at the same rate as is necessary to raise the city's share within the city. The taxes levied by the school district outside of the city contain the same exemptions as are permitted within the city. Chapter 77, SLA 1935 provides as follows:

“Sec. 13. On or before the first day of May of each year the school board shall determine the amount of funds needed for all school purposes for the following school year beginning on the first day of July and ending on June 30, the year following. It shall, at the same time, determine the proportion of the funds to be raised within the city and the proportion of the funds to be raised outside the city based on assessed valuations. It shall then present the budget to the city council for its approval or rejection of the city's share of the budget. The city council shall at its first meeting in May determine the amount it shall set aside for school purposes as its share of the school expenses for the school year and transmit this information to the school board.

The board shall then determine the share to be paid by that portion of the district lying outside the city and levy the rate outside accordingly and this rate shall be the same as is necessary to raise the city's share within the city. The city council shall transmit to the treasurer of the school board on the first day of each quarter of the fiscal school year one-fourth of its share of the budget. The assessor appointed by the school board shall, on or before the first of October of each year collect

one-half of the taxes due from all taxable property outside the city limits but within the district and, on or before the first of March of each year, he shall collect the other half. The penalties for the non-payment of taxes outside the city but within the district shall be the same as is fixed by the city council for the non-payment of taxes within the city and the rates of interest on delinquent taxes shall also be the same. Residents of the Independent School District living outside of the city limits shall be allowed the same exemption of taxes as is permitted within the city.

Section 14. All taxes levied and assessed by the school board under this article shall be a lien upon the property assessed and such lien shall be prior and paramount to all other liens and encumbrances, and may be foreclosed by an appropriate action in any court of competent jurisdiction. The owner of the property assessed shall be personally liable for the amount of taxes assessed against such property; and such taxes, together with penalties and interest, may be collected after the same become due, in a personal action brought in the name of the school district against such owner in any court of competent jurisdiction. Provided: that the school boards in independent school districts in the levy and collection of taxes shall have all of the powers and duties given to the common council of municipal corporations and the laws relative to the levy and collection of taxes in municipal corporations are hereby extended to Independent School Districts.

Further provided: That all provisions in Sections 1331 to 1336, inclusive, Compiled Laws of Alaska, 1933 (Secs. 37-3-61-37-3-66 herein), re-



quiring refunds of Territorial money to cities and incorporated school districts, and establishing procedures therefor, are hereby made applicable to Independent School Districts."

The first attempt by the Territory to exercise its taxing power on property was in 1949. The Legislature of the Territory of Alaska in 1949 enacted the Alaska Property Tax Act (Chapter 10, SLA 1949)\* which provided for a property tax of one percent on all property within the Territory of Alaska. The power to impose this tax had been granted to the Territory of Alaska by the Congress in the Organic Act of 1912.

The Alaska Property Tax Act bears a close analysis, since the purpose and effect of this Act is in question. Section 3 of the Alaska Property Tax Act levied a one percent property tax throughout the Territory. The Act, however, provided two different methods for the assessment and collection of the tax. Within the boundaries of a school district of the Territory, the tax was assessed, collected and enforced in the manner prescribed by the existing property tax law of the municipality or district. The amount of the tax collected in this manner was, with certain exceptions, retained by these local taxing units for their own use and benefit. The tax on property located outside of incorporated cities and school districts was assessed and collected in accordance with certain specific provisions included in the Alaska

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\*For text, see appendix.

property Tax Act. This portion of the tax was for the benefit and use of the Territory. The Act provided for a number of exemptions which are found in Section 6. Part of exemption (b), of Section 6, appears to exempt the property of a public utility district and an association operating utilities under arrangement with the Rural Electrification Association.

The Alaska Property Tax Act proved to be a source of litigation. On at least two occasions, the question of its validity was brought before the Court of Appeals. In the case of *Mullaney v. Hess*, 189 F. (2d) 417 (CA9), the Court of Appeals reversed the judgment of the District Court for the Fourth Division of Alaska, but did not find it necessary at that time to determine the validity of the Act. However, in *Hess v. Mullaney*, 213 F. (2d) 635 (CA9) the validity of the Act was in issue. The Court found that the lack of an over-all method of assessment was a serious defect in the statute but also found that taxpayers, Hess and others, had failed to show anything more than theoretical inequalities in the tax. Accordingly, the Court of Appeals upheld the validity of the Act.

District Judge J. L. McCarrey, in his opinion, analyzed the Alaska Property Tax Act as follows (TR-15231 p. 25):

“The Alaska Property Tax Act of 1949 (supra) purports to be a general codification of the tax law in the Territory of Alaska and clearly enumerates the exemptions (supra). I do not believe that the word ‘codification’ can be considered as being used in a ‘strained’ sense, for, in Section 3, the law states: ‘\* \* \* there shall be

assessed, collected and paid, *a tax upon all real property and improvements and personal property in the Territory \* \* \** (Emphasis supplied.) Then in Section 4 of the Act is found this language: 'The tax levied under the provisions of Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district \* \* \*', and 'All of the tax levied under this Act which is so collected *shall be remitted to such municipalities or school districts as follows: \* \* \**' (Emphasis supplied.)

Counsel for the petitioners have urged upon the court the theory that the legislature did not intend, by Chapter 10 of the 1949 Session Laws, to limit the general taxing power of the municipalities, school districts, etc. Their arguments fall under their own weight since it cannot be said that the legislature intended that the 1% authorized by this act would be in addition to that authorized to the municipalities and independent school districts enumerated above. Thus, the only reasonable interpretation which one can give to the intent of the legislature in passing Chapter 10 of the 1949 Session Laws is that it intended to codify, so to speak, all of the basic taxing laws into one general act, which they named the 'Alaska Property Tax Act,' wherein they granted certain exemptions. To give any other interpretation would result in the property of an association '\* \* \* operating utilities under arrangement with the Rural Electrification Ad-



ministration \* \* \*' being taxed by the Territory of Alaska outside of any municipality, independent school district, incorporated school district or public utility district; yet, at the same time, such an association' could not be taxed within the boundaries of the foregoing taxing entities."

To sum up the statement of the District Court, it appears that Judge McCarrey conceived the purpose of Chapter 10, SLA 1949 (Alaska Property Tax Act) to be a complete codification of all existing taxing statutes. He further stated that it cannot be said that the Legislature intended that the one percent authorized by the Alaska Property Tax Act would be in addition to those taxes authorized municipalities and independent school districts. The import of the Court's reasoning is that the one percent tax levied by the Territory of Alaska must exclude the two percent general taxing power of the municipalities.

These statements are based on a misconception or misunderstanding of the Act. The history of the two taxing powers should distinguish them, one from the other. But if there is any doubt, it should be put to rest by an express provision contained in Section 4(c) of the Alaska Property Tax Act.

"4. \* \* \*

(c) As to cities which are part of an independent school district, the amount of taxes collected shall be turned over to the city treasurer. The city treasurer is hereby authorized and empowered to turn over to the school board such part of the funds collected as may be determined by the city council from time to time necessary



*to efficiency carry on school functions in said school district. Such cities may assess and collect an additional tax on real and personal property situate in the said cities not to exceed the amount allowed by law, which tax shall be assessed and collected at the same time and in the same manner as the tax provided in Section 3 of this Act, which said funds shall be used by said cities for general municipal purposes."* (Emphasis supplied.)

With all respect to the District Court, it is difficult to justify the conclusion that the Alaska Property Tax Act is intended to be a codification of all the basic taxing laws in the Territory of Alaska. The objections to this conclusion are obvious. The Alaska Property Tax Act was intended to apply throughout the Territory of Alaska in contrast to the taxes which may be levied by the municipalities under 16-1-35 (9) ACLA 1949, which are limited to the property located within the municipal boundaries. The Alaska Property Tax Act, itself, contemplated additional taxes to be assessed and levied for school and municipal purposes, (Chapter 10, Subsection 4(c) SLA 1949).

There is, however, additional proof that the Alaska Property Tax Act was not intended to be a codification of all the taxing statutes, nor was the Act intended to limit the municipal taxing powers. It must be noted that the Alaska Property Tax Act was approved February 21, 1949. The same Legislature that was responsible for the passage of that Act also enacted Chapter 38 of the Session Laws of Alaska for 1949. Chapter 38 was approved on March 14, 1949,

less than a month after the approval of the Alaska Property Tax Act. Chapter 38, SLA 1949, provided for a general tax for school and municipal purposes. It is substantially identical with the taxing power contained in the Act of April 12, 1904, and which has appeared in the 1913 Compilation of the Laws of Alaska, the Session Laws of 1923, 1929, and 1931, the 1933 Compilation of the Laws of Alaska and the 1949 Compilation of the Laws of Alaska. But Chapter 38, SLA 1949 did more than enact the general tax on property for school and municipal purposes. It increased the power of these taxing units by authorizing a new and additional source of revenue by providing that in addition to the property tax of two percent, a consumer sales tax of two percent might be assessed by the municipalities or school districts. It is hardly logical that Chapter 10, SLA 1949, was intended to be a codification of all the basic taxing laws, when the same legislature, within a month, enlarged the taxing power of municipalities and school districts by enacting Chapter 38, SLA 1949.

Finally, the distinction between these taxing powers was noted by the Court of Appeals in *Hess v. Mulaney*, 213 F. 2d 635. The Court, in speaking of these taxing powers, stated at page 638:

“Thus it will be seen that upon the face of the statute and according to its terms, para. 3 imposes a tax of one per centum or ten mills upon all real and personal property within the Territory and wheresoever situated. By para. 4 such tax upon property within a city, school district, or utility district is to be ‘assessed, collected and

enforced in the manner prescribed by the property tax law of the municipality or district,' and the tax thus collected in the municipality or district is to be retained by such collecting entity subject to certain other provisions not here material that amounts collected by certain school districts and not used for school purposes shall revert to the territorial treasurer."

The Court recognized the distinction between the two taxing powers in the statement appearing at page 641:

"Long prior to the enactment of Chapter 10 here considered, cities and school districts within the Territory were authorized to and did levy and collect taxes for municipal and school district ordinances. The one per centum tax called for by Chapter 10 and directed by paragraph 4 thereof to be collected in the cities and districts in the manner prescribed by their local tax laws, was a tax apart from and in addition to the regular municipal and district taxes."

The District Judge, in taking the position that the Alaska Property Tax Act was a "general codification of the tax laws in the Territory of Alaska" found it possible to extend the tax exemptions provided for in that Act to other taxing statutes. Thus, the District Court held that the tax exemption provided for in the Alaska Property Tax Act for associations operating utilities under arrangement with the Rural Electrification Administration would also exempt these associations from municipal taxation. The Court reasoned as follows (TR-15231 p. 26):

“It is true that the statutes under which taxes are levied and collected by the municipalities and the school districts here in the Territory of Alaska are not referred to specifically by a cross reference. However, when all of the acts are viewed as a whole and construed together, the legislature’s intent is clear.

I am of the opinion that Chapter 10 of the Session Laws of Alaska, 1949, is a legislation passed under the broad, general taxing powers of the sovereignty of the Territory of Alaska, and while I find that the exemption given to associations operating utilities under an arrangement with the R. E. A. is somewhat broad, loose, and a general term not readily or easily defined, I find that this exemption does apply to the movant, Chugach Electric Association, Inc.

\*            \*            \*            \*            \*            \*

I find such a classification of the property exempt under the law herein in question to be a reasonable one, and should the municipalities, independent school districts, etc., of the Territory of Alaska be aggrieved by such a law covering this exemption, their recourse is with the legislature.”

It is true that the Alaska Property Tax Act provided for certain exemptions. And it is true also that some of the exemptions which appear in the Alaska Property Tax Act are similar to those which appear in the general tax for school and municipal purposes.

The exemptions under the Alaska Property Tax Act are summarized:



- a. Property used exclusively for educational, religious or charitable purposes.
- b. Property of the United States or the Territory of Alaska or any municipal corporation, independent school district and associations operating utilities under arrangement with the Rural Electrification Administration.
- c. Personal property of any person up to \$200.
- d. Property of veterans' organizations and auxiliaries.
- f. New industrial, commercial or business construction up to 3 years.
- g. Homesteads from date of entry until one year after the date of patent.
- h. An industrial incentive exemption when authorized by the Tax Commissioner.

The District Court evidently found that since this Alaska Property Tax Act was a general codification of all the taxing laws that the exemptions contained within the Alaska Property Tax Act should be read into and made a part of the general tax for school and municipal purposes. This was done admittedly without the aid of a reference to the statutes affected. It is, therefore, assumed that the District Court found the legislative intent to be that the Alaska Property Tax Act was a codification of the taxing statutes in the Territory and that this Act was intended by the legislature to extend the exemptions therein provided into all other taxing statutes of the Territory.

There is nothing in the Alaska Property Tax Act anywhere to indicate that it was to be considered or was intended to be a general taxing statute affecting other taxing powers. It has been pointed out that the contrary appears to be true. It is difficult to perceive how the exemptions contained in the Alaska Property Tax Act can be read into the general tax for school and municipal purposes. The one exemption which makes references at all to exemptions within municipalities is found under Subsection 6(h4). The exemptions granted by the Tax Commissioner of the Territory of Alaska, under the Alaska Property Tax Act, were made applicable within or without municipalities, school districts or public utility districts.

The general tax for schools and municipalities which was passed by the Legislature in 1949 as Chapter 38, SLA 1949, included certain exemptions which were specifically set forth in the Act. Those exemptions in substance are:

1. Property of the municipality or the Territory.
2. Household furniture of the head of the household up to \$200.
3. Property used exclusively for religious, educational or charitable purposes.
4. Property of veterans' organizations and auxiliaries.
5. Monies on deposit.

Some of the exemptions of Chapter 38 are identical or substantially identical to some of the exemptions

contained in the Alaska Property Tax Act. And it is likewise clearly apparent that the Alaska Property Tax Act contained certain exemptions which are not found in Chapter 38, SLA 1949. It is questionable, if the Legislature, in fact, intended that the exemptions contained in the Alaska Property Tax Act should be incorporated into the general tax for school and municipal purposes, that the same Legislature would enact a number of identical tax exemptions in both statutes. And it is even more unlikely to reach such a conclusion when Section 6(h4) of the Alaska Property Tax Act is considered. For, in this one instance, the Legislature provided that an exemption from the Alaska Property Tax Act which might be granted by the Tax Commissioner of the Territory was applicable to taxes levied under that Act within the municipality.

The general tax for school and municipal purposes was again passed by the Legislature in 1951, with the identical exemptions which were contained in Chapter 38, SLA 1949. The Legislature, in 1951, however, authorized an increase in the general tax for school and municipal purposes from two percent to three percent in accordance with the authority which had been granted by Congress in 48 USCA 44.

Finally, one remaining point may be mentioned briefly. If the Alaska Property Tax Act was intended to constitute a codification of the taxing laws of Alaska, the repeal of the Act might, in effect, constitute repeal of other taxing statutes. This can hardly have been the intention of the Legislation.

It is submitted that the conclusion reached by the District Judge in his opinion that the Alaska Property Tax Act is a general codification of the taxing statutes of the Territory of Alaska is in error. We contend that, from the examination of the statutes which are involved, there is nothing to indicate that such was a legislative intent, and the statutes, if taken together, must lead to a contrary conclusion.

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#### ARGUMENT II.

**THE DISTRICT COURT FOR THE THIRD DIVISION OF THE TERRITORY OF ALASKA COMMITTED ERROR IN FINDING THAT THE CHUGACH ELECTRIC ASSOCIATION HAD BEEN GRANTED AN EXEMPTION FROM ALL SCHOOL AND MUNICIPAL TAXES.**

The exemption claimed by the Chugach Electric Association from the general tax for school and municipal purposes cannot be sustained under any existing statute of the Territory of Alaska.

It has been previously pointed out that the claimed exemption by the association from municipal taxation cannot be sustained under Chapter 10, SLA 1949. Certainly Chapter 22, SLA 1953 did not grant such an exemption since Chapter 22 is a repealing Act and with one specific exception, accomplished the repeal of Chapter 10, SLA 1949.

The only other statute which can be put forward as a basis for the claimed exemption is Chapter 33, SLA 1953. This statute is somewhat unique and is set out below:



“CHAPTER 33  
AN ACT

(H. B. 43)

Authorizing and empowering Cities, Municipalities, School Districts, Public Utility Districts and other taxing units to classify property for the purpose of taxation and authorizing the granting of exemptions to certain classes of property; making exemptions granted and classifications made under Chapter 10, Session Laws of Alaska, 1949, binding upon such taxing units; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. All municipalities, cities of the first and second class, incorporated and independent school districts, public utility districts, and all other taxing units of the Territory having power to tax real and personal property, are hereby authorized and empowered to classify property for the purpose of taxation and to grant exemptions therefrom for the periods herein prescribed to certain classes of property as follows:

(a) New industrial, commercial and business construction may be specially classified and exempted during the period of construction and until the plants or buildings are occupied or operated, but in no case shall this exemption exceed three taxable years from the time of commencement of construction. Modifications and repairs to existing structures shall not be considered a new construction under this provision.

(b) All land, buildings, new plants, equipment and installations as are constructed, procured,

purchased or installed by new industrial enterprises are herein defined to manufacture or process products which constitute industry new to the taxing unit wherein it is located, with resultant establishment of new payrolls in such taxing unit; provided that the term 'new industry' or 'new industrial enterprise' as used therein shall mean undertakings for the purpose of manufacturing or processing products not successfully manufactured or processed in the taxing unit and for which plants have not already been constructed and placed in operation in the taxing unit; and provided, further, that the exemptions from taxation granted under this subdivision shall be not more than one-half of the tax otherwise imposed by law and shall continue for not more than 10 taxable years from the date production is commenced.

Section 2. The governing body or taxing body of the city, municipality, school district or other taxing unit concerned shall, if it desires to grant the exemptions or abatements permitted herein, do so by appropriate ordinance or resolution, which ordinance or resolution shall constitute a contract between the city, municipality, school district or taxing unit, and the owner of the property, or his or its assigns, so classified and exempted from taxation in whole or in part under the provisions of this Act.

Section 3. All exemptions granted in whole or in part, and all classifications heretofore made under the provisions of Section 6, Chapter 10, Session Laws of Alaska 1949, shall remain in full force and effect upon the terms and for the periods granted, and shall be binding upon the Territory,

and all cities, municipalities, school districts, public utility districts and other taxing units in which the property which is the subject of classification or exemption is situated, and the exemptions granted or classifications so made shall apply to all taxes levied and assessed by the city, municipality, school district, public utility district or other taxing units where the property is situated, as fully as though they had been granted or made under the provisions of this Act. The purpose and intent of this section is to carry into practical effect all classifications made and exemptions granted under the provisions of Chapter 10, Session Laws of Alaska, 1949.

Section 4. It is declared to be the purpose and intent of this Act to encourage the establishment of new industry and the construction of new buildings and structures in the Territory which bring new payrolls, new settlers and, consequently, new wealth to the Territory, and which will eventually add to the amount of taxable property in Alaska; and it is enacted for the purpose of authorizing classification of property for taxation.

Section 5. All acts and parts of acts in conflict herewith are hereby repealed to the extent of the conflict.

Section 6. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 16, 1953."

It may be observed that the Legislature in Section 1 of Chapter 33 authorized and empowered Appellants to classify property for the purpose of taxation and

to grant exemptions for limited periods to certain classes of property. Two special classes of property are identified. A classification is provided for new industrial, commercial or business construction. An exemption may be granted by the taxing unit to this class of property during the construction period, but the exemption may not exceed three years from the date construction is commenced. A second classification is provided as an incentive for the location of new industry within the taxing unit. The land, buildings, new plants, equipment and installation of new industrial enterprises may be granted an exemption by the taxing unit of one-half the tax otherwise imposed for a period not exceeding ten (10) years from the date the new industry enters production.

Both classifications are permissive, not mandatory, upon the local taxing unit and require an enacted ordinance or resolution by the taxing unit.

Section 3 of Chapter 33 refers to those exemptions granted in whole or in part and all classifications previously made under the provisions of Section 6, Chapter 10, SLA 1949. Such exemptions and classifications were to remain in full force and effect upon the terms and for the periods granted and were made binding upon all taxing units within the Territory. In order to understand more readily what is meant here, it is necessary to examine some of the sections of Chapter 10, SLA 1949.

Section 3 of the Alaska Property Tax Act, Chapter 10, SLA 1949, provided for a one percent property tax on all property within the Territory.



Section 4 of the Act provided that the assessment, collection and enforcement of the tax within incorporated cities and towns would be in the manner prescribed by the local property tax law of the municipality. The portion of the tax collected in this manner was allocated to the use of the municipality within which the property was located. It provided also that additional taxes by local taxing units were contemplated.

Section 5 of the Act provided for assessment, collection and enforcement of the tax outside incorporated cities and school districts, and the amount of revenue collected outside the incorporated areas was allocated to the use of the Territory of Alaska. Other sections of the Act provided a method for the collection of this portion of the tax.

Section 6 of the Alaska Property Tax Act provided for the granting of certain exemptions from this territory-wide property tax. The exemptions which were granted fall roughly into two distinct classes. The exemptions contained in subsections (a) through (g) of Section 6 were mandatory and self-executing. The exemption in subsection (h) however, may be distinguished from other exemptions granted under Section 6. This exemption purports to establish an incentive for new industry by means of a tax exemption. The Tax Commissioner was authorized to grant exemptions under the incentive clause of subsection 6(h) of one-half or less of the tax otherwise imposed in order to encourage new industry. The Tax Commissioner was further required to establish and promulgate general

standards and rules for determining the eligibility of applicants for exemption under these industrial incentive provisions. The period of the exemption granted by the Tax Commissioner was not to exceed ten (10) taxable years from the date the new industry entered production, and the amount of the exemption was limited to one-half of the tax otherwise assessed. In order to secure this exemption, it was necessary for a new industry to file its application for the exemption with the Tax Commissioner. It was necessary to negotiate and consummate the exemption prior to the initial commencement of production by the applicant.

One feature of the exemption is particularly important. Exemptions granted by the Tax Commissioner were made applicable within and without local taxing units. No other exemption provided for under Chapter 10 was made specifically applicable within municipalities or other local taxing units. The wording of this subsection 6(h) is suggestive that the Legislature intended exemptions negotiated and granted by the Tax Commissioner to be in the nature of a contract with each individual applicant.

The repealing Act of 1953, which is Chapter 22, SLA 1953, repealed Chapter 10, SLA 1949 with but one exception. Local taxing units were authorized by Section 2(a) of Chapter 22 to continue to collect taxes which had been levied or might be levied during the current fiscal year, under the appropriate provisions of Chapter 10, SLA 1949. Section 2(b) of Chapter 22 protected the exemption granted by the Tax Com-

missioner of the Territory insofar as the residual taxes under Chapter 10, SLA 1949 were concerned. Therefore, upon the repeal of the Alaska Property Tax Act, the tax incentive for new industry was of small significance. For, if the specific property tax itself were repealed, any particular advantage which was given to new industry by way of a special exemption would be lost. And it appears logical that Chapter 33, SLA 1953 would soon follow the repealing Act.

Chapter 33, SLA 1953 is concerned with establishing certain classifications of property for the purpose of authorizing tax exemptions which will, in turn, act as an incentive to attract new industry.

Section 4 of Chapter 33, SLA 1953, in fact, specifically, expresses the purpose and intent of the Act:

“Section 4. It is declared to be the purpose and intent of this Act to encourage the establishment of new industry and the construction of new buildings and structures in the Territory which bring new payrolls, new settlers and, consequently, new wealth to the Territory, and which will eventually add to the amount of taxable property in Alaska; and it is enacted for the purpose of authorizing classification of property for taxation.”

The purpose of Section 3 of the Act, in keeping with the over-all objective of the Act, is to carry into effect those classifications made or exemptions granted by the Tax Commissioner under Chapter 10, SLA 1949. Section 3 may be understood to preserve and extend the exemptions authorized by the Tax Commissioner for the period and to the extent originally granted.

Appellants contend that Chapter 33, SLA 1953 accomplishes nothing more than its stated purpose. The exemption now claimed by the Chugach Electric Association is entirely apart and distinct from those exemptions granted for the purpose of encouraging the location of new industry.

No allegations have been made, and certainly no evidence has been introduced by the association to establish a right to an exemption under Section 2, Chapter 33, SLA 1953. The association has not made an application to the local taxing units for either of the exemptions made permissible by Chapter 33. Nor has the association alleged and proved that it has been granted an exemption by the Tax Commissioner which must be recognized and enforced under the provisions of Section 33, SLA 1953.

It has been suggested that Chapter 33 is somewhat unique. It is also suggested that the Act may incorporate some technical defects. Particular attention is directed to Section 3 of the Act. This Section refers to exemptions granted and classifications made under Chapter 10, SLA 1949. At the time of reference, Chapter 10, SLA 1949 had been repealed entirely, except for the collection of certain residual taxes outstanding. As a general rule, a statute, when adopting a part or all of a certain statute by reference, takes the statute as it appears at the time of reference, but Section 3 does not purport to re-establish Chapter 10, SLA 1949 or any part thereof. Its purpose is to establish certain classifications or exemptions previously



granted under a repealed Act. Reference in a legislative act to a repealed law, as supplementary or explanatory of a new law, has been regarded as an absurdity (50 Am. Jur. 574).

If the purpose and intent of the Legislature, as announced in Chapter 33, SLA 1953, is to be reasonably construed, the Chugach Electric Association must be denied the exemption which it claims. It is apparent that the association is not claiming an exemption for new construction or a new industry but is claiming an exemption for associations operating utilities under arrangements with R.E.A. This exemption was repealed along with the remainder of Chapter 10, SLA 1949. It is not the type or the class of exemption within the expressed meaning of Chapter 33, SLA 1953. Moreover, as a general rule, if the granting of an exemption is in doubt, it must be resolved against the taxpayer. It has been consistently held by the Courts that a claim to a tax exemption must be in words too plain to be mistaken, and it must be founded on language which cannot be otherwise construed. The following authorities are cited in support of the rule:

*Memphis & St. L. R. Co. v. Loftin*, 105 US 258, 261;

*In re Delaware R. R. Tax*, 85 US 206, 225;

*Southwestern R. R. Co. v. Wright*, 116 US 231, 236;

*Hoge v. R. R. Co.*, 99 US 348, 355;

*North Missouri R. R. Co. v. Maguire*, 87 US 46, 61;

*Washington Chapter of American Institute of Banking v. D.C.*, 203 F(2d) 68, 70;  
*Treasurer of Puerto Rico v. Corona Brewing Corp.*, 89 F(2d) 479, 481.

Appellant's position is further strengthened by subsequent action of the 1953 Legislature. It has been observed that the Legislature repealed Chapter 10, SLA 1949 by Chapter 22, SLA 1953, and the interplay of these statutes has been previously discussed. The same Legislature, however, enacted Chapter 121, SLA 1953. This statute provides for the general tax for school and municipal purposes. That portion of the Act which is material here is set forth below:

“CHAPTER 121  
AN ACT

(H.B. 33)

To empower city councils to levy a general tax for school and municipal purposes, and to levy sales taxes within their respective municipalities; and amending Subsection Ninth of Section 16-1-35 ACLA 1949, as amended by Chapter 47 Session Laws of Alaska, 1951, and validating sales taxes already collected, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess,

levy, and collect a general tax for school and municipal purposes not to exceed 3 per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organizations and all monies on deposit, shall be exempt from taxation. The term 'property used for religious purposes,' employed herein, shall be deemed to include the residence of the pastor, priest or minister of such organization, and all other property of the organization not used for business, rent or profit. Provided, further, that if any such religious, educational, or charitable organization or such veterans organization or auxiliary derives any rentals or profits from such property owned by it or them, such property shall not be exempt. Provided, further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation."

This specific taxing statute carries its own specific exemptions. It is a well-known rule that statutes of

general application must yield to specific statutes covering the same subject matter:

*Murphy Oil Co. v. Burnet*, 55 F(2d) 17, 25;  
*Karrell v. U.S.*, 181 F(2d) 981, 986.

Since Chapter 121, SLA 1953 is a statute expressly conferring a specific taxing power upon municipalities, the specific exemptions contained therein are controlling. It has been noted that Chapter 10, SLA 1949 contained a classification or type of exemption which did not appear in the general tax for school and municipal purposes. That is, no incentive for new industry was provided for in the general tax for school and municipal purposes. Chapter 33, SLA 1953 made it possible for local taxing units to classify and exempt new industry from taxation by enacting the appropriate ordinance or resolution, but the exemption claimed by the Association is not for classification and exemption as new industry. The exemption claimed is of the type or class specifically set forth in Chapter 121 SLA 1953. Since it is not included as an exemption, then it must be taken that the Legislature did not see fit to grant it. The Court was in error in finding that the Appellee was entitled to the exemption claimed. In effect, if the decision of the District Court is upheld, it will be reading into Chapter 121 SLA 1953 a new exemption for associations operating utilities under arrangements with the R.E.A. In every case that a valid exemption has been granted from this specific taxing power, it has been by way of a specific amendment to the statute. Thus, in 1929, the Legislature exempted from the general school and municipal



taxes, monies on deposits, and in 1931, the Legislature of Alaska exempted from the same tax, property owned by veterans' organizations and their auxiliaries. These exclusions were created by specific amendments to the specific taxing power affected.

Furthermore, the claim of exemption, upon which Appellee relies, is not expressly mentioned in Chapter 33 SLA 1953. Inclusion of the alleged exemption can be accomplished only by implication and interpretation, which was the method adopted by the Trial Court in arriving at its decision. Appellants point out that the only exemptions permitted by Chapter 33 are classifications of property for limited duration and upon conditions expressly stated by the Legislature. Chapter 33, therefore, can be construed only to be operative upon the classifications or exemptions, whichever they be referred to, that are expressly enumerated within its sections. Being so formed, the statute thus comes within the rule of statutory construction, which recognizes that when a statute enumerates the objects to which it is applicable, all objects not expressly mentioned in such statute are to be deemed excluded from the statute and cannot, by implication or otherwise, be subjected to its operative provisions.

*Brotherhood of Railway and Steamship Clerks,  
Freight Handlers, etc. v. Norfolk Southern  
Railway Company*, 154 A.L.R. 1385, 143 F  
(2d) 1015.

Appellants submit that if all the statutes bearing on this matter are examined, the true intent of the

Legislature is understandable. In general, however, the statutes seem to add confusion upon confusion. Therefore, Appellants submit two additional alternate solutions to the problem.

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### ARGUMENT III.

**THE EXEMPTION CLAIMED BY THE CHUGACH ELECTRIC ASSOCIATION, INC., FOUND IN CHAPTER 10, SESSION LAWS OF ALASKA, 1949, APPLIED ONLY TO TAXES LEVIED UNDER THAT ACT AND THE EXEMPTION DOES NOT AFFECT THE TAXING STATUTES UNDER WHICH THE GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES IS LEVIED.**

In 1953 the Legislature of the Territory of Alaska repealed the Alaska Property Tax Act. The repealing Act is, itself, unusual and in order to be understood it is necessary to review some rather novel features of Chapter 10, SLA 1949.

In substance the Act provided for a one percent property tax throughout the Territory. It provided that collection of the tax within municipalities and school district would be accomplished by the municipality or school district and that this portion of the tax might be retained by the local unit for its own benefit. At the same time municipalities were authorized a property tax under other specific taxing powers (Chapter 38, SLA 1953). Finally, Chapter 10 included a number of exemptions which were contained in Section 6 of the Act. These exemptions fall into two classes. A number of self-executing exemptions are provided but subsection 6(h) established an industrial incentive exemption. In this instance the exemption is granted by the Tax Commissioner of the Territory

and is limited both in time and extent. The exemptions thus granted, appellants contend, were made specifically applicable to taxes collected under that Act within or without municipalities or other local taxing units, and not to other taxes collectible by local taxing units.

The repealing Act, Chapter 22, SLA 1953, can more readily be understood if the foregoing provisions are kept in mind. Chapter 22 is set out below.

## “CHAPTER 22 AN ACT

(H.B. 3)

To repeal the Alaska Property Tax Act, enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949; excepting from repeal certain taxes and tax exemptions; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6 (h) of Chapter 10, Session Laws of Alaska 1949.

Section 3. An emergency is hereby declared to exist and this Act shall be in full force and effect for and after the date of its passage and approval."

It is apparent that Chapter 22 contains two distinct sections. Section 1 of the Act simply repealed the Alaska Property Tax Act of 1949. However, Section 2 of the Act is of major importance since this section contained an exception from the general repeal. Under Section 2 (a) any taxes levied and assessed by a municipality, school district, or public utility district under the Alaska Property Tax Act, or which might be levied and assessed during the current fiscal year were expressly excluded from the general repeal. Municipalities were, therefore, authorized to collect and to retain taxes, which had been assessed or which might be assessed, during the current fiscal year under the appropriate sections of the Alaska Property Tax Act. Having secured for the municipalities this revenue, the Legislature likewise undertook to protect those exemptions granted by the Tax Commissioner of the Territory under the industrial incentive clause (Chapter 10, SLA 1949, Section 6(h)). It has been noted that under Subsection 6(h4) of the Alaska Property Tax Act the exemptions granted by the Tax Commissioner under the industrial incentive clause were expressly applicable within or without



municipalities, school districts or public utility districts. These specific exemptions were protected by Section 2(b) of Chapter 22, SLA 1953. Thus, while appellants might have continued to collect a limited amount of tax under the Alaska Property Tax Act, in collecting the tax they were required to observe only those exemptions granted by the Tax Commissioner under the industrial incentive clause of the Alaska Property Tax Act. Other than the limited exception here discussed, Chapter 22, SLA 1953 accomplished the complete repeal of the Alaska Property Tax. Included in the repeal under Chapter 22, SLA 1953 is Section 6(h) of Chapter 10, SLA 1949 which Appellee relies upon to support the exemption claimed.

Apparently, it was possible therefore for municipalities to collect taxes under the Alaska Property Tax Act without observing any other exemptions beyond the one specifically protected.

It might be argued that Section 3 of Chapter 33 was therefore enacted to extend the remaining exemptions which had not been covered under Section 2 of Chapter 22 to the residual tax which might be collected under Chapter 10.

It is clear in any event that Section 3 is concerned only with exemptions then existing and not with the creation of new exemptions.

It seems more in harmony however with the legislative intent that Chapter 22, Section 2 (b) only retained the exemption for new industry insofar as the

residual taxes levied under Chapter 10, SLA 1949 are concerned, and all other exemptions were thereby repealed.

Further, that the concern which the Legislature felt in seeking to encourage new industry to Alaska to assist the development of the country is again reflected in the enactment of Chapter 33, SLA 1953.

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#### ARGUMENT IV.

**THE DISTRICT COURT FOR THE THIRD DIVISION, TERRITORY OF ALASKA, COMMITTED ERROR BY DISMISSING THE PETITIONS FILED BY THE CITY OF ANCHORAGE AND THE ANCHORAGE INDEPENDENT SCHOOL DISTRICT IN ORDER TO ENFORCE THE COLLECTION OF LOCAL TAXES.**

A motion to dismiss and a motion for summary judgment serve their most useful purpose where from the pleadings and documentary proof available no controverted fact issue remains and only questions of law are to be decided. Even the important and doubtful questions of law will not be decided on a motion to dismiss if a hearing on the merits may serve to clarify the issues. Barron and Holtzoff, Volume 1 at page 605.

It is true that the District Court found no well-founded doubt in this case (TR-15231 pp. 29-30):

“In conclusion, I find no well-founded doubt in this case. The legislature has granted an exemption to co-operatives operating utilities under ‘arrangement’ with the R.E.A. As previously discussed, this exemption is not expressed in as clear language as could be desired. However, I find that the legislature did intend such an exemp-

tion and it is obvious that none but co-operatives such as the Chugach Electric Association, Inc., and other co-operatives in a like position as Chugach Electric Association, Inc., could qualify.

The difficulty of the interpretation of the tax problem and the applicability of the expression herein presented to the taxpayer and the courts is a classic example of the ever-increasing and growing need for the legislature to pass legislation creating better taxation laws."

It seems, however, that the District Court even as it denied the existence of doubt implied the contrary to be true. The Court pointed out that the Legislature has granted an exemption to co-operatives operating utilities under arrangements with the R.E.A. Presumably, the Court made a finding that the Chugach Electric Association qualified as an association operating utilities under "*arrangements*" with the R.E.A. Appellants suggest that the meaning of the exemption itself is open to some doubt. There is, at least in the appellants' opinion, considerable doubt about the application of the exemption in question.

The District Court decided the issue solely on one of three separate grounds. The Court recited the other two grounds relied upon in support of the motion were that the co-operative is a government instrumentality and therefore is not taxable; and second, that the co-operative property is located wholly within the Alaska Terminal Reserve with title being in the government and therefore not taxable.

Certainly, whether the Chugach Electric Association is a governmental agency is open to doubt. The

association is organized under the appropriate statutes of the Territory of Alaska, and operates for the purpose of generating and selling electrical energy to its members.

It is not created as a corporation of the United States and therefore must prove that it is engaged in a governmental function. Title 7 USCA 901 et seq. establishes the R.E.A. The powers of the Administration generally are limited to financing co-operatives organized under the state or territorial laws. The R.E.A., like many other government agencies, in its dealings with local entities assumes the status of a mortgagee which under the existing statutes of Alaska is not the owner of legal title to any property subject of the mortgage.

In the case of *Capitol Building & Loan Association, et al., v. Kansas Commission of Labor and Industry, et al.*, 83 P.(2d) 106, 118 A.L.R. 1212, a Kansas non-profit corporation claimed an exemption from certain state taxes by reason of the fact that it had subscribed for stock in a Federal Home Loan Bank organized under Federal law. There the plaintiff advanced the same theories that are here advanced by Appellee. The Court, at page 1217 of the A.L.R. Annotation stated,

“The term ‘Federal instrumentality’ is not defined in our statutes, but is a common one in the law books. An instrumentality is anything used as a means or agency. . . . Therefore, a Federal instrumentality is a means or agency used by the Federal Government. . . . Thus, in 2 Cooley on



Taxation, (4th Edition) 1300, it is said, 'A corporation cannot escape state taxation merely because it is created by the Federal Government, nor because it was subsidized by it, nor because it is employed by the Federal Government wholly or in part, unless it is really an agency or instrumentality for the exercise of constitutional powers of the United States.'

"It is apparent that not every person who uses his property or derives profit in his dealings with the Government may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of the Government within the meaning of the [immunity] rule."

The Court then ordered that judgment should be entered in favor of the defendant Tax Commission. Other cases are cited.

*Capitol Building & Loan Association, et al., v. Kansas Commission of Labor and Industry, et al.*, 83 P.(2d) 106, 118 A.L.R. 1212;

*Metcalf & Eddy v. Mitchell*, 269 U.S. 514;

*Susquehanna Power Co. v. State Tax Commission of Maryland*, 283 U.S. 291;

*Atlantic Coastline Railroad Co. v. Maxwell*, 178 S.E. 592;

*Short v. Board of School District*, 177 Atl. 480.

Upon the authority of the foregoing cases, there is no merit to the contention of Appellee that it is an instrumentality of the Federal Government. It cannot escape taxation by the Appellants merely because it is, in effect, subsidized by federal loans. Neither

can it claim immunity by reason of the fact that it may be said to be carrying out a purpose recognized by the Federal Government to extend the electrification of rural areas. Appellee is a private corporation, although it is classified as non-profit, and is, under Territorial law and by the provision of its Articles of Incorporation and By-Laws, engaged for the profit of its members. Being so engaged, it actually is not an agency or instrumentality exercising any constitutional powers on behalf of the United States.

And finally, whether the property of Chugach Electric Association located within the city boundaries is exempt from taxation because it is located on the lands of the Alaska Terminal Reserve would seem to be doubtful. It has been held that the Alaska Terminal Reserve is within the boundaries of the City of Anchorage and that the property of a resident within that area could be taxed by the City.

*City of Anchorage v. Akers*, 100 F. Supp. 2.

The District Court stated that it decided this issue on the following points of law (TR-15231 p. 29):

“Points of law which I have considered in the determination of this problem are: There is a presumption against the surrender of taxing power (51 Am Jur 526 at p. 529); therefore, the party claiming the exemption has the burden of proof (51 Am Jur 527 at p. 530), and the existence of a well-founded doubt of an exemption is fatal. (Bank of Commerce v. Tennessee, 161 US 134.) It is also a general principle of law that a statute concerning a municipality (City of Miami v. Kayfetz, 30 So. 2d 521; Fisher v. City of Pittsburgh,

112 Atl. 2d 814) and a school district (Madison County v. School District #2, 27 NW 2d 172) must be strictly construed, since they are both governmental subdivisions.”

It is suggested that if the District Court had decided the case below on the points of law considered, the result would be contrary to the ultimate conclusion reached by the Court. Appellants contend that if the rules of law expressed are given effect, the decision of the District Court must be reversed.

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#### IV.

#### CONCLUSION.

Chugach Electrical Association claims an exemption under Chapter 10, SLA 1949 for the benefit of associations operating utilities under arrangement with the R.E.A. It is suggested by the association that this exemption is also intended to apply to local taxing powers. Examination of the Territorial statutes leads to the conclusion that Chapter 10, SLA 1949 was repealed, leaving only residual taxes to be collected. The only exemption recognized by the repealing statute was the exemption which was to benefit and encourage new industry within the Territory. Chapter 33, SLA 1953 authorized local taxing units to classify properties so as to benefit and encourage new industry within their boundaries. The stated purpose and intent of the statute is specifically set forth and is in accord with Appellants' analysis. Municipalities and school districts have been given specific taxing powers.

Those taxing powers contain specific exemptions from the application of the tax. The Court, therefore, committed error in concluding that the Chugach Electric Association was entitled to the exemption which it claimed. The District Court was also in error in finding that no well-founded doubt obtained as to the existence of the claimed exemption.

For the reasons heretofore stated, the judgment of the District Court should be reversed. On remand, this Court should direct the lower Court to allow such further proceedings, upon Appellants' petitions, as are appropriate under the decision to be rendered herein.

Dated, Anchorage, Alaska,  
January 10, 1957.

Respectfully submitted,

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*Attorney for Appellant*

*City of Anchorage.*

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*Anchorage Independent*

*School District.*

**(Appendix Follows.)**



## **Appendix.**



## Appendix

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### STATUTES CITED IN BRIEF.

#### “CHAPTER 10

#### AN ACT

(H.B. 2)

Levying a tax on property in Alaska; providing for collection thereof, and allowing certain exemptions; defining offenses and prescribing penalties; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. TITLE. This Act may be cited as the ‘Alaska Property Tax Act’.

Section 2. DEFINITIONS. As used in this Act, the following words and terms shall have the meanings ascribed to them in this section unless the context clearly indicates a different meaning:

(a) The word ‘assessor’ means an authorized representative of a Board of Assessment and Equalization designated to perform the duties of making assessments in a judicial division.

(b) The word ‘board’ means a Board of Assessment and Equalization.

(c) The word ‘Collector’ means the Tax Commissioner or his authorized representative, employee or agent designated by him.

(d) The word ‘division’ means judicial division as understood and recognized in Alaska.

(e) The word 'improvements' includes all buildings, Structures, fences and additions erected upon or affixed to the land, whether or not the title of the land has been acquired by any particular person.

(f) The word 'include', when used in a definition contained in this Act, shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(g) The word 'person' means and includes any individual, trustee, receiver, firm, partnership, joint venture, syndicate, association, corporation, trust, or any other group acting as a unit.

(h) The words 'personalty' or 'personal property' shall mean all machinery, equipment, household goods, and other tangible personal property which is located on or used in connection with particular land, or owned, possessed or used independently of any particular land.

(i) The word 'property' means and includes real property, improvements, and personalty, as herein defined.

(j) The words 'real property' or 'land' mean any estate or interest therein, including permit or licensed rights, and improvements thereon, and shall include all timber on patented lands.

(k) The words 'Tax Commissioner' means the Tax Commissioner of the Territory of Alaska.

(l) The words 'tax lien' embrace liens for penalties, interest and costs as well as for unpaid taxes.



(m) The word 'Territory' means the Territory of Alaska.

Section 3. LEVY OF TAX. For the calendar year of 1949, and each calendar year thereafter there is hereby levied, and there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory at the rate of one per centum of the true and full value thereof. For the purposes of this section the assessed value of unimproved, unpatented mining claims which are not producing, and non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is hereby fixed at \$500.00 per each 20 acres or fraction of each such claim, except that if the surface ground of any such claim is used for other than mining purposes and has a separate and independent value for such other purposes, the valuation as pertains to such non-mining uses and of improvements incidental to such uses shall be according to the full and true value thereof.

Section 4. TAX UPON PROPERTY WITHIN INCORPORATED CITIES AND DISTRICTS. The tax levied under the provisions of Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district, by and at the expense of the municipalities and districts prorated proportionately between each, provided that

amounts levied but which prove uncollectible, and the cost of foreclosure on delinquent accounts shall be borne by the city or school and public utility district.

All of the tax levied under this Act which is so collected shall be remitted to such municipalities or school districts as follows:

(a) As to cities which are not a part of an independent school district the municipal tax collection authority shall turn the amount of tax collected over to the city treasurer.

(b) As to incorporated school districts the tax collectors thereof shall turn the amount of tax collected over to the district school board.

(c) As to cities which are part of an independent school district the amount of taxes collected shall be turned over to the city treasurer. The city treasurer is hereby authorized and empowered to turn over to the school board such part of the funds collected as may be determined by the city council from time to time necessary to efficiently carry on school functions in said school district. Such cities may assess and collect an additional tax on real and personal property situate in the said cities not to exceed the amount allowed by law, which tax shall be assessed and collected at the same time and in the same manner as the tax provided in Section 3 of this Act, which said funds shall be used by said cities for general municipal purposes. Regarding that part of independent school districts outside of town bounds, the tax collection authority therein shall turn the taxes collected over to the dis-

trict school board; provided that the millage levy for school purposes shall be uniform within incorporated school districts whether said district includes another incorporated municipality or not and any unused remainder up to the maximum levy hereunder shall revert to the Territorial Treasurer except that portion collected within any incorporated municipality within the boundary of such school district in which case such remainder, unused for school purposes, shall revert to the treasury of the incorporated municipality in which it may be collected.

(d) Taxes collected hereunder within a public utility district shall be handled in a like manner to those collected in cities or other incorporated municipalities, including collection costs, remissions and school millage levy provisions as set forth herein.

(e) In all cases where such local units are to receive such tax collections, the local tax collection authority shall, upon delivery of the money as above set forth, obtain a receipt in duplicate therefor and forward the duplicate thereof to the Tax Commissioner. The time or times to be set for payment on account of such collections shall be prescribed by the Tax Commissioner. Such other accounting as may be indicated shall be made to the Tax Commissioner at such times and in such manner as may be prescribed by him.

The tax money so collected which remains after remissions have been made shall be transmitted to the Tax Commissioner at such intervals and in such man-

ner as he shall direct, for deposit with the Treasurer, to be covered into the general fund of the Territory.

Section 5. TAX ON PROPERTY OUTSIDE INCORPORATED CITIES AND SCHOOL DISTRICTS. The tax levied under the provisions of Section 3 upon property outside the limits of an incorporated city, independent school district, or incorporated school district or public utility district in the Territory shall be assessed, collected and enforced as provided in this Act.

#### Section 6. EXEMPTIONS.

(a) Property shall be exempt from taxation hereunder when used exclusively for educational, religious, or charitable purposes.

(b) The property of the United States, of the Territory, and of any municipal corporation, independent school district, incorporated school district, public utility district and association operating utilities under arrangement with the Rural Electrification Administration, shall be exempt hereunder.

(c) The personal property of any person to the value of \$200.00 shall be exempt hereunder.

(d) The property of any organization not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization, and all monies on deposit belonging to such organization shall be exempt hereunder, except any such property which produces rentals or profits for such organization.



(e) The laws exempting certain property from levy and sale on execution shall not apply to taxes levied hereunder or to the collection thereof.

(f) New industrial, commercial and business construction shall be exempt during the period of construction and until the plants or buildings are occupied or operated, but in no case shall this exemption exceed three taxable years from the time of beginning of construction. Modifications and repairs to existing structures shall not be considered new construction under this provision.

(g) All homesteads upon which entry has been made in accordance with the land laws of the United States shall be exempt from the date of entry until one year after the date upon which patent shall have been granted and final title acquired. Such exemptions shall include all improvements upon such homesteads pertaining to residential or agricultural purposes.

(h) **INDUSTRIAL INCENTIVE CLAUSE.** The Tax Commissioner is authorized to grant incentive exemptions hereunder in the manner and to the extent hereinafter set forth:

(1) An exemption of one-half of the tax otherwise imposed hereunder, or such other lesser fraction thereof as the Tax Commissioner may deem to be a necessary and proper encouragement to new industry as hereinafter defined, for such period not exceeding 10 taxable years from the date production is commenced, upon new plants and buildings and other installations, real estate and equipment, as are con-

structed and procured by new industrial enterprises, as hereinafter defined, to manufacture or process products which constitute industry new to Alaska with resultant establishment of new payrolls in Alaska.

The terms 'new industry' or 'new industrial enterprises' as used herein shall mean undertakings for the purpose of manufacturing or processing products not manufactured or processed in Alaska on the effective date hereof and for which plants have not already been established in Alaska.

(2) The Tax Commissioner shall establish and promulgate general standards and rules conformable to this Act for determining the eligibility of applicants for exemptions hereunder, and the extent to which exemptions for such applicants respectively are to be granted, including such factors as: permanence of the industry involved; the amount of its capital investment; whether it is a seasonal or continuous operation; whether it will likely be marginal because of distance from principal markets; transportation costs and differential in cost of production in Alaska compared to cost of productions elsewhere; the number of resident Alaskan workmen who will be given employment; and other pertinent factors, related to improving the economy of the Territory of Alaska. He shall also consider in each case the recommendation of the Divisional Board of Assessment of the division in which the new industry is proposed to be established, which recommendation shall be obtained by the applicant in advance of the application and attached thereto. After all such factors are taken into considera-

tion, the decision of the Tax Commissioner shall be rendered, subject, however, to final approval of the Divisional Board of Assessment. If after studying the Tax Commissioner's findings and decisions, the said Board, acting by majority of its members, is unable to agree with said decision, it shall, after reasonable notice to the Tax Commissioner and the affected new industry, hold a hearing and make the decision, which shall be final, except that when such exemption decision expires, the position of the new industry may be re-evaluated and extension granted within the maximum limits allowed hereunder, in the same manner as provided for the granting of the original exemption.

(3) All exemptions granted hereunder shall be negotiated and consummated prior to the initial commencement of production by the applicant.

(4) Exemptions granted by the Tax Commissioner hereunder shall be applicable within or without municipalities, school districts or public utility districts.

## Section 7. RETURNS.

(a) On or before the 15th day of July in the year 1949, and on or before the 15th day of March in each year thereafter, every person shall submit in duplicate to the assessor of the judicial division, a return of his property, and of the property held or controlled by him in a representative capacity, in the manner prescribed in this Act, which return shall be based on values existing as of January 1 in the same year.

(b) In every case the person making the return shall state an address to which all notices required

to be given to him under this Act may be mailed or delivered.

(c) The return shall show the nature, quantity, amount and value of the property, the place where the property is situated, and said return shall be in such form as the Tax Commissioner may prescribe, and shall be signed and verified by the person liable, or his or its authorized agent or representative.

Section 8. ADDITIONAL RETURNS. The assessor may, by notice in writing to any person by whom a return has been made require from him a further return containing additional details and more explicit particulars, and upon receipt of the notice, that person shall comply fully with its requirements within thirty days after its receipt by him.

Section 9. POWER TO MAKE EXAMINATIONS.

(a) An assessor shall not be bound to accept as correct the return made by any person, but if he thinks it necessary or expedient, or if he suspects that a person who has not made a return is liable to assessment, he shall make an independent investigation as to the property of that person, and may make his own valuation and assessment of the taxable amount thereof, which will be *prima facie* good and sufficient for all legal purposes.

(b) For the purpose of such examination, the assessor, personally or by any deputy designated by him, may enter upon any premises and may examine any property thereon, and shall have access to and may



examine all property records involved, and such person shall, upon request, furnish to the assessor or deputy every facility and assistance for the purposes of such examination.

(c) An assessor may in any case examine a person on oath or otherwise, and upon request of the assessor, the person shall attend and submit himself to examination by the assessor.

Section 10. INSPECTION OF RETURN. No return made by any person under this Act shall be open for inspection by any person except officers authorized by law to administer this Act, or upon an official investigation or proceedings in court, and any Territorial employee who violates said restriction by communicating any information obtained under the provisions of this Act, except such information as is required by law to be shown on the assessment rolls, or allows any person not legally entitled thereto to inspect or have access to any return made under the provisions of this Act shall be guilty of a misdemeanor punishable under the penalty clause of this Act, and shall be discharged from his office or employment and be ineligible to hold any public office or employment for the Territory for a period of two years thereafter.

Section 11. VALUATION. Property shall be assessed at its full and true value in money, as of January 1 of the assessment year. In determining the full and true value of property in money, the person making the return, or the assessor, as the case may be, shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation,

nor shall he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, either separately or in the aggregate with all of the property in the taxing district, but he shall value the property at such sum as he believes the same to be fairly worth in money at the time of assessment. The true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor.

Section 12. ASSESSMENT. Every person shall be assessed and taxed annually on his property in the division in which the property is situated, and where any parcel of land is situated partly in one division and partly in another or partly within a municipality or school district and partly elsewhere, the assessment in respect of that parcel shall be made in the division or district within which the greater part of the property is situated. Real property and personalty shall be separately assessed.

### Section 13. TO WHOM ASSESSED.

(a) Subject to subsection (b) and (c) of this section, property shall be assessed and taxed in the name of the owner or claimant or where the property is owned, occupied or claimed by two or more persons, it shall be assessed and taxed in the names of the owners, occupiers or claimants jointly.

(b) Where a verified statement is furnished showing that property has become the subject of a contract of sale or been leased by the owner to another person, the name of the other person shall be noted on the assessment roll and like notice of the assessment

shall be sent to him as to the owner, in which case the taxes assessed in respect of the property may be received, either from the owner or from the purchaser or tenant, or from any optionee, prospective distributee, purchaser or encumbrancer who desires to safeguard the title to the property.

(c) Land of the United States or the Territory which is held under any mining location, lease, license, agreement for sale, accepted application for purchase, or otherwise, shall be assessed and taxed in the name of the occupier according to the value of his interest therein (except as above modified in this Act with respect to certain mining claims); but no assessment or taxation in respect of land so held or occupied shall in any way affect the rights of the United States in the land.

(d) Where the property assessed is owned by two or more persons in undivided shares, each owner shall be assessed on the undivided interest at the proportion of the assessed value of the property that his undivided interest bears to the whole.

#### Section 14. CONTENT OF ASSESSMENT ROLL.

(a) The assessor of each division shall prepare an annual assessment roll for each division covering property outside of municipalities and school districts and public utility districts, after consideration of all returns made to him pursuant to this Act, and after careful inquiry from such sources as he may deem reliable. On the roll he shall enter the following particulars:

(1) the names and last known addresses of all persons with property liable to assessment and taxation;

(2) a description of all taxable property;

(3) the assessed value, quantity, or amount of said property and the taxes thereon;

(4) the arrears of taxes owing by any persons; and,

(5) any other information that may be required by the Tax Commissioner.

(b) It shall be a sufficient description of any property for the purposes of this Act, if there is entered on the assessment roll the best available short description of the property.

### Section 15. ASSESSMENT NOTICE.

(a) The assessor, before completion of the assessment roll, shall give to every person named thereon a notice of assessment, showing the valuation and assessment of his property and the amount of taxes thereon, in such form as the Tax Commissioner may prescribe. At least 60 days must be allowed from date of such mailing within which to appeal to the Board against the assessment. He shall enter on the roll opposite the name of each person the date of giving the assessment notice which entry shall be prima facie evidence of the giving of the notice. On the back of each assessment notice shall be printed a brief summary for the information of the taxpayer, of the dates when the taxes are payable, delinquent, and subject to interest, dates when the Board will sit for equaliza-



tion purposes, and any other particular specified by the Tax Commissioner.

(b) The assessment notice shall be directed to the person to whom it is to be given, and shall be sufficiently given if it is mailed by first class mail addressed to, or is delivered at, his address as last known to the assessor; or, if the address is not known to the assessor, the notice may be mailed addressed to the person at the postoffice nearest to the place where the property is situated. The date on which the notice is so mailed or is so delivered for all purposes of this Act shall be deemed to be the date on which the notice is given.

Section 16. **COMPLETION OF ASSESSMENT ROLL.** The assessor shall complete the annual assessment roll for the year 1949 on or before the 1st day of September and for each year thereafter on or before the 1st day of July of that year, which shall be based on values of January 1st immediately preceding, and shall certify the same by attaching thereto a certificate in a form to be prescribed by the Tax Commissioner. Such supplementary assessment rolls shall be prepared and certified as may be deemed necessary or expedient.

Section 17. **EFFECT OF ASSESSMENT ROLL.** All taxes to be levied or collected under this Act shall, except as otherwise provided, be calculated, levied and collected upon the assessment entered in the assessment rolls and certified by the respective assessors as correct, subject to the taxpayers' rights

of appeal and to the corrections and amendments made in the rolls pursuant to this Act.

Section 18. PROVISIONS APPLICABLE TO SUPPLEMENTARY ROLLS. All the duties imposed upon the assessor with respect to the annual assessment roll and all the provisions of this Act relating to assessment rolls shall, so far as applicable, apply to supplementary assessment rolls.

Section 19. CORRECTION OF ERRORS BY ASSESSOR. Any assessor may correct any error, omission or invalidity made or arising in the preparation of the assessment roll at any time before the sitting of the Board. It shall be the duty of every person receiving a notice of assessment to advise the assessor of any error, omission or invalidity he may have observed in the assessment of his property, in order that the assessor may correct the same.

Section 20. TRANSMISSION OF ROLL TO THE TAX COMMISSIONER.

(a) A Copy of all assessment rolls shall be certified and transmitted to the Tax Commissioner at Juneau not later than one month after the completion of same unless the time for transmission is extended by the Tax Commissioner. This shall be in addition to deposit of the assessment roll for retention in the division as required in Section 22.

(b) All corrections and amendments made in the roll pursuant to this Act or the decisions of the Board or the courts, and which are not shown on the assess-

ment roll deposited with the collector or upon the copy transmitted to the Tax Commissioner at Juneau, shall be forthwith reported to the collector by the assessor.

**Section 21. VALIDITY OF ASSESSMENT ROLLS.** Every assessment roll as completed and certified by the assessor, and as corrected and amended by him from time to time in conformity with this Act and the decisions of the Board shall, except insofar as the same may be further amended on appeal to the court, be valid and binding on all persons, notwithstanding any defect, error, omission or invalidity existing in the assessment roll or any part thereof, and notwithstanding any proceedings pertaining thereto.

**Section 22. DEPOSIT OF ROLL WITH COLLECTOR.** Upon a completed assessment roll being amended by the assessor in conformity with the decisions of his Board, the assessor shall deliver the roll to the collector, for retention in the division to which it applies, and the roll shall be open during office hours to the inspection of all taxpayers of the division.

**Section 23. SITTINGS AND RECORDS OF BOARD.** For the purpose of scrutinizing the assessment roll and its supplements, and taking corrective action thereon, or for hearing appeals in respect of any assessment roll, or from any assessment made under this Act, the Board in each division shall sit and adjourn from time to time as its business may require, and shall record its proceedings and decisions. During all periods when a Board is not in session, its records and decisions shall be kept by the assessor.

## Section 24. NOTICES BY BOARD.

(a) Where the name of any person is ordered by the Board to be entered on the assessment roll, by way of addition or substitution, for the purpose of assessment the Board shall cause notice thereof to be mailed by the assessor to that person or his agent in like manner as provided in Section 15, giving him at least 60 days from the date of such mailing within which to appeal to the Board against the assessment.

(b) Whenever it appears to the Board that there are overcharges or errors or invalidities in the assessment roll, or in any of the proceedings leading up to or subsequent to the completion of the roll, and there is no appeal before the Board in which the same may be dealt with, the Board may notify parties affected with the view of hearing them.

## Section 25. APPEAL BY PERSON ASSESSED.

(a) Any person whose name appears on the assessment roll for any division or who is assessed in any district, may appeal to the Board with respect to any alleged overcharge, error, omission or neglect of the assessor.

(b) Notice of appeal, in writing, shall be filed with the Board within 60 days after the date on which the assessor's notice of assessment was given to the person appealing. Such notice must contain a certification that a true copy thereof was mailed or delivered to the assessor. If notice of appeal is not given within that period, right of appeal shall cease, unless it is shown to the satisfaction of the Board that the taxpayer was unable to appeal within the time so limited.



(c) A copy of the notice of appeal must be sent to the assessor as above indicated.

Section 26. **APPEAL RECORD.** Upon receipt of the notice of appeal, the assessor shall make a record of the same in such form as the Tax Commissioner may direct, which record shall contain all the information shown on the assessment roll in respect of the subject matter of the appeal, and the assessor shall place the same before the Board from time to time as may be required by the Board.

Section 27. **NOTICE OF HEARING.** Not less than 30 days before the sittings at which the appeal is to be heard, the Board shall cause a notice to be mailed by the assessor to the person by whom the notice of appeal was given, and to every other person in respect of whom the appeal is taken, to their respective addresses as last known to the assessor. The form of such notice shall be prescribed by the Tax Commissioner.

Section 28. **HEARING OF APPEAL.**

(a) At the time appointed for the hearing of the appeal, the Board shall hear the appellant, the assessor, other parties to the appeal and their witnesses, and consider the testimony and evidence adduced, and shall determine the matters in question on the merits and render its decision accordingly.

(b) If any party to whom notice was mailed as above set forth fail to appear, the Board may proceed with the hearing in his absence.

(c) The burden of proof in all cases shall be upon the party appealing.

Section 29. ENTRY OF DECISIONS. The Board shall from time to time enter in the appeal record its decisions upon appeals brought before it, and shall certify to the same. The assessor, upon receipt of the appeal record, and subject in every case to any appeal taken to the courts, shall enter in the assessment roll such amendments as may be necessary to give effect to the decisions of the Board.

Section 30. COLLECTION UNAFFECTED BY APPEAL. Neither the giving of a notice of appeal by any taxpayer, nor any delay in the hearing of the appeal by the Board shall in any way affect the due date, the delinquency date, the interest, or any liability for payment provided by this Act in respect of any tax which is the subject matter of the appeal. In the event of the tax being set aside or reduced by the Board on appeal, the Tax Commissioner shall refund to the taxpayer the amount of the tax or excess tax paid by him, and of any interest imposed and paid on any such tax or excess.

Section 31. APPEAL TO COURT. Any person feeling aggrieved by any order of the Board shall have the right of appeal on a de novo basis to the District Court for the Territory of Alaska in the division in which the matter is pending. Such appeal shall be pursued as nearly as may be in accordance with the procedure prescribed in Sections 68-9-4 to 68-9-14 inclusive, Alaska Compiled Laws Annotated 1949, governing appeals from a Justice's Court in civil cases and the Tax Commissioner shall promulgate uniform regulations adapting the above referenced procedure for perfecting such appeals.

Section 32. TIME OF PAYMENT. Taxes for a calendar year shall be payable annually the first day of February of the ensuing year. Failure to pay on said due date shall cause the tax to become delinquent and shall subject the property assessed to the interest and penalty additions hereinafter provided. Payments of taxes may be made at any time before their due date, but no discount shall be allowed for such early payment.

Section 33. MODE OF PAYMENT. All taxes payable under this Act shall be paid in lawful money of the United States or its equivalent, at the office of the collector in the judicial division in which same are due.

#### Section 34. LIEN.

(a) The taxes assessed upon property, together with interest and penalty, shall be a lien thereon from and after assessment until paid, and no sale or transfer of such property shall in any way affect the lien of such taxes.

(b) Liens for taxes hereunder shall be first liens and paramount to all prior and subsequent encumbrances, alienations and descents of the property.

#### Section 35. INTEREST.

(a) For failure to pay taxes when due, interest inclusive of penalty at the rate of one percent per month shall be added on the first of each month until the tax is paid or the property sold hereunder, but not to exceed the legal rate of interest in the aggregate.

(b) Where a tax becomes payable in respect to property assessed on a supplementary assessment roll, the like interest shall be added to and recovered as a part of the tax as might have been imposed if the return and the assessment had been made at the time prescribed by this Act and the tax had been duly levied and had not been paid.

**Section 36. FAILURE OR REFUSAL TO COMPLY WITH ACT.** Every person who, without reasonable excuse, in violation of any provision of this Act or of the regulations made thereunder—

(a) refuses or fails to make any return required to be made; or,

(b) in the making of any return, or otherwise, wilfully withholds any information necessary for ascertaining the true taxable amount of any property; or,

(c) refuses or fails to furnish to the assessor or his employee or agent any access, facility, or assistance required for the purpose of an entry on or examination of property or records; or,

(d) refuses or fails to attend or submit himself to examination on oath or otherwise by the assessor, the Board or the Tax Commissioner when duly cited so to do;—shall, in addition to penalties otherwise prescribed herein, be guilty of an offense against this Act.

**Section 37. FALSE RETURNS AND RECORDS.** Every person who knowingly and wilfully makes any false or deceptive statement in any return required to be made under this Act, or fraudu-



lently omits to give therein a full and correct statement of the property of the taxpayer, or makes or keeps any false entry or record in any book of account or record required to be kept under this Act, shall be liable, on conviction, to a fine of not less than One Hundred Dollars and not more than One Thousand Dollars.

**Section 38. DEFACING POSTED NOTICES.** Every person who, without reasonable excuse, tears down, injures or defaces any advertisement, notice or document which, under the authority of this Act or the regulations made thereunder, is posted in a public place, shall be guilty of an offense against this Act.

**Section 39. PENALTY FOR OFFENSES.** Every person guilty of an offense against this Act for which no other penalty is specifically provided, shall be liable, on conviction, for a first offense to a fine not exceeding Five Hundred Dollars, and for a second or subsequent offense to a fine of not less than One Hundred Dollars and not more than One Thousand Dollars.

**Section 40. LIABILITY OF CORPORATE OFFICERS, ETC.** Every director, manager, secretary or other officer of a corporation or association, and every member of a partnership or syndicate, who knowingly and wilfully authorizes or permits any Act, default, or refusal which would subject the organization to criminal liability hereunder, shall be likewise personally guilty of such offense.

**Section 41. PROSECUTIONS.** Prosecutions hereunder for imposing of fines shall be at the instance

of the Tax Commissioner and be brought in the name of the Territory.

**Section 42. RECOVERY OF UNPAID LIENS.**  
On or after the first day of April of any year, the Tax Commissioner may, with the assistance of the Attorney General, file in the office of the clerk of the district court in the division in which property subject to delinquent taxes is situated, a list of all parcels affected by unpaid liens. Thereafter the Tax Commissioner shall, unless the matter be otherwise resolved, proceed to foreclosure of said liens in substantially the manner prescribed in Sections 22-2-8 to 22-2-18, both inclusive, of Alaska Compiled Laws Annotated 1949, for the foreclosure of land registration liens, and all pertinent provisions of said sections are hereby adopted as applicable hereto.

**Section 43. BOARDS OF ASSESSMENT AND EQUALIZATION.**

(a) There is hereby created and established for each judicial division a Board of Assessment and Equalization.

(b) Each Board shall consist of three members appointed by the Governor subject to confirmation by the majority of the members of both Houses convened in Joint Session, provided, however, that persons appointed may perform the duties of their offices until action by the ensuing Legislature is taken either confirming or rejecting such appointments.

(1) Board members shall be appointed solely on the grounds of fitness to perform the duties of the office.

(2) In the event of a vacancy on any Board, a successor shall be appointed to serve for the balance of the unexpired term.

(c) The term of each Board member shall be six years, except as hereinafter provided, but any person duly appointed and qualified shall hold office until his successor is appointed and qualified. No Board member shall be eligible to serve more than one six-year term.

(1) The terms of the members first appointed for each Board shall begin when they are appointed and qualified and shall continue for the following periods: one until March 31, 1951, one until March 31, 1953, and one until March 31, 1955.

(2) A Board member may be removed from office by the Governor after notice and opportunity for hearing, upon grounds of inefficiency, neglect of duty, malfeasance in office, but for no other cause whatever.

(d) The principal offices of the respective Boards shall be located in the following cities: for the First Judicial Division at Juneau, for the Second Judicial Division at Nome, for the Third Judicial Division at Anchorage, and for the Fourth Judicial Division at Fairbanks.

(e) The compensation of each Board member shall be \$15.00 for each day actually spent in the performance of his duties, including all the time away from his place of residence in connection therewith, together with per diem and travel expense payable in accordance with vouchers issued by the Tax Commissioner.

(f) Each Board, within its judicial division, shall have the power and duty, subject to the approval of the Tax Commissioner as to all expenses of Board operations, to:—

(1) exercise general supervision and direct the activities of assessment and equalization of property taxes;

(2) select an employee or employees or enter into contracts with qualified persons to perform the functions of appraiser and assessor; provided, that persons so appointed shall have the technical and other qualifications prescribed by the Tax Commissioner, and be engaged at rates of compensation prescribed by the Tax Commissioner;

(3) keep an accurate and complete record of all Board business, orders and processes, which records shall be open to public inspection at all reasonable times;

(4) hold hearings and conduct investigations required in the administration of the assessment provisions of this Act and hear and determine appeals involving assessment of property, at such points in their respective divisions as will serve the general convenience of the public, provided that written minutes may be kept of the testimony of witnesses without making a word by word record thereof;

(5) require attendance of witnesses and production of all necessary evidence at any hearings and administer oaths in the course of investigations conducted or hearings held pursuant to the provisions of this Act;



(6) require such searches and appraisements by the assessor as the Board sees fit;

(7) require officers and employees of incorporated cities and districts to furnish such information concerning assessment and equalization of property taxes as is deemed necessary;

(8) perform all duties specifically imposed and exercise all powers conferred upon the Board.

Section 44. TAX COMMISSIONER. The Tax Commissioner shall be the collector of taxes levied under this Act and enforce collections with the aid of such divisional collectors or other deputy collectors and personnel as he may see fit to appoint. He shall administer all provisions of this Act except those specifically assigned to a board or under the purview of municipal or school district authority. The Tax Commissioner shall prescribe and furnish all necessary forms, and promulgate and publish all needful rules and regulations conformable herewith for the assessment and collection of any tax herein imposed, and shall voucher for expenditures according to law.

Section 45. SEVERABILITY CLAUSE. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 46. EMERGENCY CLAUSE. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved, February 21, 1949."



Nos. 15,231 and 15,232

IN THE

United States Court of Appeals  
For the Ninth Circuit

CITY OF ANCHORAGE, a Municipal  
Corporation, *Appellant,*

vs.

No. 15,231

CHUGACH ELECTRIC ASSOCIATION,  
INC., *Appellee.*

ANCHORAGE INDEPENDENT SCHOOL DIS-  
TRICT, *Appellant,*

vs.

No. 15,232

CHUGACH ELECTRIC ASSOCIATION,  
INC., *Appellee.*

Appeal from the District Court for the District of Alaska,  
Third Division.

BRIEF FOR APPELLEE  
CHUGACH ELECTRIC ASSOCIATION, INC.

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FILED

JUN 5 1957

PAUL P. O'BRIEN, CLERK





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**BRIEF FOR APPELLEE  
CHUGACH ELECTRIC ASSOCIATION, INC.**

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**JURISDICTION.**

The question of jurisdiction is correctly stated in  
Appellant's Brief.

(2) In regarding evidence of other alleged misrepresentations as tending to prove that appellant made the misrepresentation charged in the indictment.

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## I.

### **THE TRIAL COURT BASED ITS JUDGMENT UPON THE ERRONEOUS PROPOSITION THAT CARELESSNESS WOULD JUSTIFY CONVICTION.**

This Court quotes certain language in the "Judgment and Commitment," filed June 26, 1956 (T. 20-22), as indicating that the trial court made a finding that appellant had wilfully (i.e. consciously) made the representation referred to in the indictment. But a month previously, on May 28, 1956, the trial court had filed a formal "Judgment" (T. 14-15) which reads as follows:

#### **"Judgment**

"In accordance with the findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal filed herein, it is the judgment of the court that the defendant is guilty as charged in counts one and two of the indictment.

"Further, it is ordered that the defendant be referred to the Probation Office for a presentence report, and the time of sentence is tentatively set for June 26, 1956, at 2 p.m. in the United States Courthouse in Sacramento, California."

This Judgment, filed on May 28, was the determination and adjudication of guilt, and the subsequent

“Judgment and Commitment” consisted of the pronouncing of sentence plus a mere *recital* of what had *previously* taken place (determination of guilt and imposition of sentence being separate steps in the proceeding—Cf. *Pollard v. United States*, 77 S. Ct. 481, 484, 352 U.S. 360, 1 L. Ed. 393, 397).

The “Judgment and Commitment” filed on June 26, 1956 is in the form suggested in the specimen forms promulgated with the Federal Rules of Criminal Procedure and contains the recitals prescribed in those rules. But, as this Court has said in *Sanders v. Johnston*, 165 F. 2d 736 (cert. den. 68 S. Ct. 1328, 334 U.S. 829, 92 L. Ed. 1757, rehearing denied 69 S. Ct. 7, 335 U.S. 838, 93 L. Ed. 390):

“Rule 32(b) prescribes a recital in the judgment of the several steps taken by the court during the progress of a case from the entry of a plea to the pronouncement of sentence. Such a recital in the judgment would be *prima facie* evidence that the steps set forth therein actually took place, but it does not follow that a failure to make such a recital in the written judgment nullifies steps which did in fact occur.”

Conversely, in the case at bar the mere recital in the June 26 “Judgment and Commitment” of the several steps which had *theretofore* been taken in the case, could not nullify the fact that the adjudication of guilt *which the court had already made* and filed on May 28th *was expressly based on the findings of fact and conclusions of law contained in the ruling of the same date (T. 5-14) on the motions for judgment of ac-*

ion in emphasizing the following portion of the Act in question:

“There shall be assessed, collected and paid a tax upon all real property and improvements and personal property in the Territory.” (TR 15231, Page 25.)

We submit, therefore, that in view of the language employed in Chapter 10, SLA, 1949, the Legislature intended that the exemptions provided for therein should apply to municipalities, school districts and other political subdivisions. To hold otherwise would, in effect, place the Territory in the position of declaring a public policy for the protection and encouragement of various groups, organizations and types of business from the taxing power of the Territory and yet remove from them that protection and encouragement insofar as cities, school districts and other political subdivisions are concerned. It is obvious that the Legislature had no such intention.

The exemption upon which the Court rendered its decision and upon which Appellee herein relies is that contained in Chapter 10, SLA, 1949, Subsection 6(b) as follows:

“Property of the United States or the Territory of Alaska or any municipal corporation, independent school district and association operating utilities under arrangement with the Rural Electrification Administration.” (Appellants’ Brief, Appendix, Page vi.)

These exemptions were re-enacted by Chapter 33, SLA, 1953.



While it might be true that the language employed under this exemption provision may have been couched in more precise language, nevertheless, the obvious intent of the Legislature was to protect from taxation those associations in the utility field operating under arrangement with the Rural Electrification Administration. There is no question whatsoever but what this applies to the Appellee herein. The interpretation sought by Appellants of the exemptions above set forth would, in effect, permit the taxation of city property by school and public utility districts, taxation of school property by the public utility districts and the city, and the taxation of all of these by the Territory of Alaska, leading to an absurdity, and bring about a chaotic taxing condition in the Territory. It is also helpful to resort to the history of the enactment of Chapter 33, SLA, 1953, as reflected by the legislative journal, in arriving at the true intent of the Legislature. The Act in question originated as House Bill No. 43, by Messrs. Boardman and Estaugh, entitled "An Act authorizing and empowering Municipalities, School Districts and Public Utility Districts to classify property for the purpose of taxation and to grant exemptions to certain classes of property; and declaring an emergency." (Page 170, Journal of the House, 1953.) This Act was referred to the Committee on Municipal Affairs. Said bill was referred back to the House by the Committee on Municipal Affairs with the recommendation that it do pass, with the following amendments:

Strike the title and insert in lieu thereof: "An Act authorizing and empowering Cities, Munici-

palities, School Districts, Public Utility Districts and other taxing units to classify property for the purpose of taxes; and granting exemptions to certain classes of property; making exemptions granted and classifications made under Chapter 10, Session Laws of Alaska, 1949, binding upon such taxing units; and declaring an emergency.”

Strike Section 3 and insert in lieu thereof: “Section 3: All exemptions granted in whole or in part and all classifications heretofore made under the provisions of Section 6, Chapter 10, Session Laws of Alaska, 1949, shall remain in full force and effect upon the terms and for the periods granted, and shall be binding upon the Territory and all Cities, Municipalities, School Districts, Public Utility Districts and other taxing units in which the property which is the subject of classification or exemption is situated, and the exemptions granted or classifications so made shall apply to all taxes levied and affixed by the City, Municipality, School District, Public Utility District, or other taxing units where the property is situated as fully as though they had been granted or made under this Act. The purpose and intent of this Section is to carry into practical effect all classifications made and exemptions granted under the provisions of Chapter 10, Session Laws of Alaska, 1949.” (Page 210, Journal of the House, 1953.)

The recommendations of the Committee on Municipal Affairs were adopted and the bill passed unanimously in its amended form. (Page 215, Journal of the House, 1953.) This bill, with minor changes not here germane, was passed by the Senate and ultimately approved by

the Governor. An examination of both the change in the title and in Section 3 is of considerable interest in determining the intent of the Legislature.

The reference by Appellants to Chapter 38, SLA, 1949, is of little assistance in determining the issues of this case for it will be noted that Subsection Ninth of Section 16-1-35, ACLA, 1949, is a verbatim repetition of said Section Ninth. The balance of the law provides for a consumers' sales tax and referendum and could in no way be construed as affecting the provisions of Chapter 10, SLA, 1949. A close examination of Chapter 33, SLA, 1953, leaves no doubt but what the exemptions set forth therein were to apply to not only the Territory but to all cities, municipalities, school districts, public utility districts and other taxing units within the Territory. The only intent that can be drawn from the provisions of said Act and as so announced by the 1953 Legislature is to carry into practical effect all classifications made and exemptions granted under the provisions of Chapter 10, SLA, 1949. By using the language that it employed, the 1953 Legislature placed the same construction upon the exemptions granted in Chapter 10, SLA, 1949, as that made by the District Court.

## II.

**THE DISTRICT COURT FOR THE THIRD DIVISION OF THE TERRITORY OF ALASKA DID NOT COMMIT ERROR IN FINDING THAT THE CHUGACH ELECTRIC ASSOCIATION HAD BEEN GRANTED AN EXEMPTION FROM ALL SCHOOL AND MUNICIPAL TAXES.**

It is submitted that the exemption claimed by the Chugach Electric Association is so plainly evident by the statutes that no construction is really necessary. Appellants go to great length in discussing the classifications and the part played by the Tax Commissioner under Subsection 6(h) of Chapter 10, SLA, 1949. It is difficult to understand why Appellants have found it necessary to go into such detail in discussing this particular provision of the aforesaid law inasmuch as Appellee has never contended, does not now contend, nor did the Court rule that the exemptions applied to Chugach Electric Association were based on that particular subsection. On the contrary, the District Court agreed with Appellee herein that the applicable provision of the law was contained in Section 6(b) of Chapter 10, SLA, 1949, as re-enacted by Chapter 33, SLA, 1953. It will be noted that the language used in said subsection is mandatory, self-executing, and does not require any action on the part of the Tax Commissioner whatsoever. Section 3 of Chapter 33, SLA, 1953 (Appellants' Brief, Page 27) incorporated all of the exemption provisions in Chapter 10, SLA, 1949, which provided, among other things, that the exemptions should be binding upon not only the Territory but all other taxing units in which the property is situated. The Legislature, un-



doubtedly in an effort to prevent any erroneous construction or interpretation, states specifically the intent of the particular subsection involved as follows:

“The purpose and intent of this section is to carry into practical effect all classifications made and exemptions granted under the provisions of Chapter 10, SLA, 1949.”

It is significant to note here that this particular subsection is separate and distinct from the sections pertaining to incentive exemptions to industrial, commercial and business enterprises. It is quite obvious from a reading of the statute that the Legislature had a two-fold purpose in mind; (1) to provide for exemptions that would encourage and promote new enterprise in the Territory; and (2) to protect and foster a healthy climate for all classes of property coming within the provisions of Section 6(b), SLA, 1949. The Legislature could not have more clearly expressed its desire to exempt the property here in question. By using the language it employed in enacting Chapter 33, SLA, 1953, the Legislature obviously intended to include all of the exemptions contained therein. That the provisions contained in Section 6(b) are self-executing and mandatory is conceded by Appellants. (Appellants' Brief, Page 31.) It is self-evident that the Appellants have arrived at an erroneous conclusion in contending that the intent of the Legislature was to exempt only that property which had been classified and determined by the Tax Commissioner. Appellants are certainly inconsistent in contending that Section 3 of Chapter 33, SLA, 1953, preserved

and extended the exemptions authorized by the Tax Commissioner, and on the other hand, did not preserve and extend the other exemptions contained therein. Appellants attempt to fortify their erroneous conclusion by further asserting that the Appellee Association has not made an application to the local taxing unit nor been granted a tax exemption by the Tax Commissioner. This has been discussed by Appellee previously but, at the cost of repetition, may it once again be emphasized that the Appellee herein has never contended that it was relying upon those particular provisions of the tax exemption statute but rather upon the mandatory and self-executing provisions declaring the property of Appellee exempt.

It is conceded, as stated by Appellants, that as a general proposition reference by a legislative act to a repealed law as supplementary or explanatory has been regarded as an absurdity. However, such a broad statement of principal should be and has been qualified. A repeated statute may be revived where such effect clearly appears to have been the intent of the Legislature. (50 *AmJur*, Page 574.) The 1953 Legislature in effect re-enacted the exemption provisions of Chapter 10, SLA, 1949. The re-enactment of a statute which has been repealed invalidates the previous repeal and restores the statute to effective operation. (*Sutherland, Statutory Construction*, Page 513.) It is fundamental construction that sections and acts in *pari materia* and all parts thereof should be construed together and compared with each other, and reference may be made to earlier statutes on the sub-

ject which are regarded in *pari materia* with the later statute. (50 *AmJur*, Page 354.) It is further a primary rule of construction that in the interpretation of statutes the legislative will is the all-important or controlling factor and, as has been frequently stated, the intention of the Legislature constitutes the law so that the duty of the Court is to ascertain and declare the intention of the Legislature and to carry such intention into effect to the fullest degree. To have adopted the construction suggested by Appellants would be, in effect, to nullify and defeat the intention of the Legislature, which would be contrary to all rules of construction. (50 *AmJur*, Page 200.) When the plain language of Chapter 33, SLA, 1953, is considered, together with the rules of construction aforementioned, the District Court could have arrived at no other conclusion than that it was the intention of the Legislature to exempt as a matter of public policy that property coming within the provisions of Section 6(b), Chapter 10, SLA, 1949. A judicial construction should be in keeping with the natural and probable legislative purpose and avoid conflict and harmonize with the applicable provisions of the law on the subject, if possible. (Vol. 16, *McQuillin, Municipal Corporations*, Page 39.) There certainly was no duty on the Legislature to spell out each exemption contemplated by Chapter 33, SLA, 1953, when their manifest intention was to re-enact the exemptions contained in Chapter 10, SLA, 1949.

The scope and purview of a statute is frequently considered by the Court in its interpretation, and such



interpretation is to render such statute consistent or in conformity with its general scope or purview. It can be gathered from the language of Chapter 33, SLA, 1953, that its general scope and purview was not only to afford incentive to new industry but to encourage and foster associations operating utilities under arrangement with the Rural Electrification Administration.

It is conceded that ordinarily statutory exemptions must be resolved against the taxpayer. Nevertheless, such strict construction must be considered in light of another rule of construction as applied to municipal corporations, for municipal corporations, unlike a sovereign state, possess no inherent power of taxation, and the exercise of such power is dependent upon legislative or constitutional grant, and authorization to impose taxes by cities is strictly construed against said city. (*Fisher v. City of Pittsburgh*, 112 Atlantic 2d 814) (*City of Miami v. Kayfetz*, 30 Southern 2d 521.) So that any attempt to exercise a taxing power as by levying an ad valorem tax upon property in a municipality which is found not to be within the powers granted to a municipality is ultra virus and void. (38 *AmJur*, Page 68.) And it has been held that a city council is without power to levy a tax on exempt property. (*East Lincoln Lodge No. 210, AF and AM v. City of Lincoln*, 268 Northwest 91.) Such grant of power is to be strictly construed and it must be made to clearly appear that such authority vested in a municipality is free from any doubt, and where doubt exists, it must be resolved against the municipality. (38 *AmJur*, Page 72) (Vol. 16, *McQuillin*,



*Municipal Corporations*, Page 15.) An examination of the opinion of the District Court will reflect that he considered and weighed the two rules of construction above set forth. (TR 15231, Page 29.) Such statutes should be given a reasonable construction without bias or prejudice against either the taxpayer or the state or municipality to carry out the intention of the Legislature, and further the important public interest which such statutes subserve. (Vol. 16, *McQuillin, Municipal Corporations*, Page 39.) The District Court in considering this matter undoubtedly took judicial notice of the situation existing in Alaska with reference to the generation and distribution of electrical power, for it is a matter of common general knowledge. For without the assistance of the Rural Electrification Administration and co-operatives operating thereunder, it would undoubtedly be extremely difficult, if not impossible, for the rural areas in Alaska to receive this vital service. (20 *AmJur*, Page 48.) Such matters of common knowledge may receive the recognition in the Courts of both original and appellate jurisdiction that they would have received if formally proved and made a part of the record. This rule is of practical value in the law of appeal for the missing links in the testimony often may be supplied by judicial knowledge. (20 *AmJur*, Page 54.) This proposition is not without precedent for in *Arkansas Valley Co-operative Rural Electric Co., et al., v. Elkins*, 141 Southwestern Reporter 2d, Page 538, the Court states at Page 540:

“We take a judicial notice of the Act of Congress, May 20, 1936, creating an agency of the United States to be known as the Rural Electrifi-

cation Administration, Title 7, United States Code Annotated, 901. Under this Act, great sums of money were set aside with which to make loans to local co-operative agencies throughout the nation to enable rural residents to secure the conveniences afforded by electrical service, a privilege that had theretofore been denied to them on account of the prohibitive cost."

The expression by the Court in the above case is fully applicable to the case before us.

We submit that the District Court, being fully aware of this situation, arrived at the correct conclusion that as a matter of public policy the Legislature intended to assist and foster co-operatives in Alaska who were engaged in electrical distribution and generation under arrangements with the Rural Electrification Administration, and that they manifested such intent by making such co-operatives exempt from taxation by either the Territory or its political subdivisions.

In attempting to defeat the obvious intent of the Legislature, Appellants advanced the ingenious argument that Chapter 10, SLA, 1949, and the exemptions contained thereunder applied only to the Territory, and in the same breath Appellants contend that the Territory, even though it had lost its authority to tax property and declare exemptions by virtue of the repeal of said Act, that the exemptions subsequently provided for in Chapter 33, SLA, 1953, were also directed only at the Territory. If the exemptions set forth in Chapter 10, SLA, 1949, applied solely to the

Territory, why then would the exemptions be re-enacted in Chapter 33, SLA, 1953, after the prior law had been repealed? The only logical conclusion and the one at which the Court arrived is that the exemptions were meant to apply uniformly to municipalities and other political subdivisions, as well as the Territory of Alaska, insofar as the property tax is concerned.

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### III.

**THE EXEMPTION CLAIMED BY CHUGACH ELECTRIC ASSOCIATION, INC., APPLIED TO ALL PROPERTY TAXES LEVIED IN THE TERRITORY AND AFFECTED ALL TAXING UNITS WITHIN SAID TERRITORY.**

While it appears that the argument presented by Appellants in this instance is for the most part repetitious, it is felt that some answer is required, which will be treated as briefly as possible. Appellee agrees with Appellants that Chapter 10, SLA, 1949, was repealed by the 1953 Legislature by the enactment of Chapter 22, SLA, 1953, and Appellee further agrees with Appellants that the exemptions set forth in Section 6, Chapter 10, SLA, 1949, contain a number of self-executing exemptions. Here, once again, however, the Appellants are persisting in the error of assuming that the District Court ruled as it did and that Appellee relied upon Section 6(h) of the above Act. This they quite specifically state as follows:

“Included in the repeal of Chapter 22, SLA, 1953, is Section 6(h) of Chapter 10, SLA, 1949, which Appellee relies upon to support the exemption claimed.” (Appellants’ Brief, Page 43.)



On the contrary, as has been stated before, the Court based its decision upon Subsection 6(b) of Chapter 10, SLA, 1949, as re-enacted in Chapter 33, SLA, 1953. There certainly can be no question but what the Appellee herein came within the purview of said subsection. It will be further noted that Chapter 22, SLA, 1953, repealing Chapter 10, SLA, 1949, and Chapter 33, SLA, 1953, were enacted by the same Legislature within a few days of each other. It is obvious that the Legislature, being aware of the omissions with reference to exemptions under Chapter 22, SLA, 1953, hastened to cure the matter by the enactment of Chapter 33 of the same session. It is a well-established principle of construction that the enactment by a legislative body of two or more acts upon the same subject matter creates a presumption that the acts which were born of the same legislative mind were actuated with the same policy and were intended to coexist to attain by their mutual operation the object of the legislation. (*Sutherland, Statutory Construction*, Page 483.) These two Acts, together with Chapter 10, SLA, 1949, are Acts in pari materia and it must be assumed that the Legislature was considering the implications of the entire matter of property tax legislation when it enacted the above laws. Having once pre-empted the field of property taxation by virtue of the enactment of Chapter 10, SLA, 1949, the Legislature dealt with the entire subject matter, including therein tax legislation for schools and other purposes, and dealt with the entire property tax question both within the Territory and its political subdivisions, including exemptions both permissive and mandatory.



In summary, it can be stated that the Legislature was not only concerned with incentives for new industry but that it was also concerned with fostering and assisting co-operatives engaging in generation and distribution of electric energy, which were then and now are of such great importance to the Territory.

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#### IV.

**THE DISTRICT COURT FOR THE THIRD DIVISION, TERRITORY OF ALASKA, DID NOT ERR IN DISMISSING THE PETITIONS FILED BY THE CITY OF ANCHORAGE AND THE ANCHORAGE INDEPENDENT SCHOOL DISTRICT AS TO CHUGACH ELECTRIC ASSOCIATION, INC.**

This matter was submitted to the District Court on the basis of the pleadings, which consisted of the petitions by the City of Anchorage and the Independent School District, and the objections supported by the affidavit of Marlin Stewart and motion to dismiss by Appellee. Paragraph 3 of the motion to consolidate and to dismiss filed by Appellee sets forth as a basis for such dismissal that the petitions failed to state a claim against Chugach Electric Association, Inc., upon which relief can be granted. (TR 15231, Page 17.) In its objections to the tax and proposed order of sale, Appellee further moved to dismiss on the grounds that the Court lacked jurisdiction, and objected to the validity of the tax in question on the basis that Appellee was exempt from said taxation as a matter of law. The motion to dismiss performed substantially the same function as the old common law general demur-

rer and is the usual and proper method of testing the legal sufficiency of the complaint. For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted, (*Moore's Federal Practice*, 2nd Edition, Volume 2, Page 2244) and a dismissal will lie if it appears that the complaint is without merit or a disclosure of some fact is made which will necessarily defeat the claim. If it appears that plaintiff is entitled to no relief under any state of facts which could be provided in support of the claim, said complaint should be dismissed. (*Moore's Federal Practice*, 2nd Edition, Volume 2, Page 2245) (Citing *Robbins v. Zabarski*, 44 Federal Supplement 867, holding that the question whether plaintiff was within a class exempted from the Fair Labor Standards Act could be determined on motion to dismiss where the facts appeared on the face of the complaint.) The same general principle was followed in the case of *Ballaine v. Alaska Northern Railway Company* (*United States intervening*) reported in 259 Federal 183, decided by this Court in 1919. The foregoing case involved a demurrer filed by the United States on the basis of which the Court dismissed the complaint of Ballaine against the Alaska Northern Railway Company, upon the grounds that Ballaine's action was one sounding in tort and that the real party defendant was the United States, and that there was no jurisdiction to proceed with the cause. The District Court in the instant case was in a position to decide as a matter of law, as reflected by the pleadings, that the Chugach Electric Association was exempt and that therefore the attempt by the Anchorage Inde-

pendent School District and the City of Anchorage to impose taxes on Appellee was null and void and the petitions subject to dismissal without requiring a hearing on the merits.

It does not appear from the opinion of the District Court that the Court entertained any doubt as to the exemption claimed by Chugach Electric Association, and the mere fact that the statute might be couched in better language does not reflect such doubt, for the Court, without hesitation, declared the true intent of the Legislature. Both the affidavit of Marlin Stewart and the other pleadings filed by Appellee, which, incidentally, were not denied by Appellants herein, make it abundantly clear that the Chugach Electric Association was qualified under the exemption as an association operating utilities under arrangement with the Rural Electrification Administration.

Appellants seemed to take exception to the use of the word "arrangements" by utilizing the same (Appellants' Brief, Page 45) and concluded therefrom that the application of the exemption in question would require a hearing and could not be determined on a motion to dismiss.

The word "arrangements" which could, perhaps, have been spelled out in a more precise manner in the Act in question, has previously received judicial construction. (*People v. American Ice Company*, 120 NYS 443.) Page 449 in the above case defines the word "arrangements" as follows:

"Disposition of measures for the accomplishment of a purpose; preparation for successful

performance \* \* \* I think these definitions of the word 'arrangements' are sufficient to carry to your minds what was intended by the Legislature when it passed the Act."

There is certainly no question but what the Chugach Electric Association and the Rural Electrification Administration, as manifested by the pleadings and other evidence before the Court, constituted an arrangement between the two.

It is highly doubtful that this Court will consider the balance of the argument by Appellants with reference to Chugach Electric Association being a government instrumentality and on the further ground that the Appellee's property is located wholly within the Alaska Terminal Reserve and therefore not taxable. We submit that these arguments are immaterial inasmuch as the Court did not consider them in its decision. However, inasmuch as Appellants have submitted such arguments to the Court, Appellee will make an attempt to briefly answer the same without belaboring the matter. It certainly will not be denied that the Chugach Electric Association is operated by virtue of an agreement entered into with the Rural Electrification Administration under the provisions of Title 7, USCA 901, et seq. It is further true that the Chugach Electric Association by virtue of several million dollars loaned to it by the Rural Electrification Administration executed a mortgage to the government agency. In order to obtain said loan, the Administrator of the Rural Electrification Administration was required by law under Title 7, USCA, Section



904, to find and certify that in his judgment the security for said loans was reasonably adequate, and that the loans would be repaid within the time agreed. The period set forth for repayment under the Act is thirty-five years, bearing two percent interest. In order to protect the investment of money advanced by the United States, the Administrator is required to exercise considerable supervision over the operation of the co-operative. He must approve the appointment of any consulting engineer hired by the co-operative; he must approve the plans, specifications, material and equipment; any contracts with third parties must also be approved; the co-operative is required to submit a periodical financial report and their books are subject to inspection and audit by the Administrator. (Title 6, *Code of Federal Regulations*, 1949, Page 87.) Considering the extent to which the federal Act and regulations have gone in protecting the government investment, and the relationship existing between the government agency and Chugach Electric Association, would, it is submitted, constitute the Chugach Electric Association under the circumstances an instrumentality of the government and not subject to taxation. (51 *AmJur*, Page 279.) The Supreme Court, in similar instances, have held this to be true. The Supreme Court used the following pertinent language in the case of *Federal Land Bank of St. Paul v. Bismarck Lumber Company*, 314 US 95, 102:

“The National Farm Loan Association, the local co-operative corporations of borrowers thereto in which the land banks make loans to individuals are also government agencies.”

The cases cited by Appellants under this particular principle are readily distinguished from the case at bar.

It has not been denied by Appellants that the Alaska Railroad Terminal Reserve is property owned by the United States of America. It is well settled that a state and its subordinate taxing units are without power to subject to taxation the property of the federal government or the means, instrumentalities and agencies thereof which it employs to carry out its proper functions unless Congress expressly confers a right upon the state to tax such agencies, instrumentalities or property. (51 *AmJur*, Page 279) (*McQuillin, Municipal Corporations*, 3rd Edition, Volume 16, Page 135.) This is even more true of a territory on the theory that a territory or dependency may not tax its sovereign. (51 *AmJur*, Page 92.) In addition to the foregoing, there is a specific prohibition against imposing any tax upon the property of the United States, contained in Section 9 of the Organic Act. We find this same provision recited in Section 6(b) of Chapter 10, SLA, 1949.

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### CONCLUSION.

The Distric Court was correct in dismissing the petitions as to Chugach Electric Association, Inc., and in holding that as a basis for such dismissal that said Association came within the exemptions under Section 6(b), Chapter 10, SLA, 1949, as re-enacted by Chapter 33, SLA, 1953. To hold that such exemptions did

not apply to local taxing powers as contended for by Appellants would be, in effect, to ignore the manifest intent of the Legislature. A contrary decision would render the entire intent of the legislation so far as property taxing in the Territory is concerned a nullity. It would ignore the general scope and purview of the statutes involved and render ineffective a desire on the part of the Legislature to not only afford incentives to new industry but also ignore the general policy of fostering, encouraging and assisting electrical co-operatives in their struggle to bring electrical energy to the citizens in the rural areas of Alaska. The decision of the District Court should be sustained.

Dated, Anchorage, Alaska,

May 21, 1957.

Respectfully submitted,

J. EARL COOPER,

*Attorney for Appellee*

*Chugach Electric Association, Inc.*





No. 15,251

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CHOW BING KEW,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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BRIEF FOR APPELLANT.

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FILE

DEC 10 1956

PAUL P. O'BRIEN,



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No. 15,251

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

CHOW BING KEW,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF FOR APPELLANT.**

---

**JURISDICTIONAL STATEMENT.**

The appeal is from a judgment (T. 14) of the United States District Court for the Northern District of California, Northern Division, adjudging the appellant guilty on two counts of a criminal indictment charging violation of 18 U.S.C., Section 911 and 18 U.S.C., Section 1001.<sup>1</sup>

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<sup>1</sup>Sec. 911. "Whoever falsely and wilfully represents himself to be a citizen of the United States shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

Sec. 1001. "Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up, by any trick, scheme or device, a material fact or makes any false, fictitious or fraudulent statements or representations \* \* \* shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Jurisdiction for the trial of such offenses is conferred upon the Court below by 18 U.S.C., Section 3231. Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U.S.C., Section 1291.

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### **STATEMENT OF THE CASE.**

The appellant is a citizen of China who came to this country in 1929 at the age of 17 and was lawfully admitted for permanent residence. In the ensuing years he became successful in business, and at the time of the events described in the indictment was a member of the firm of Daylite Markets, a partnership which operated six supermarkets in various cities in California (T. 131, 97, 98), and as president of several corporations was engaged in various other legitimate business enterprises (T. 110).

#### **(a) The first count of the indictment.**

Count one of the indictment charges that on January 18, 1952, appellant falsely represented himself to be a citizen of the United States in violation of 18 U.S.C. Section 911 (T. 3). In the language of the Court below:

“The Government’s proof on this count consisted of an application for a California alcoholic beverage license filed January 18, 1952, signed by the defendant. In response to a question contained in the application, ‘Are you a citizen of the United States?’ the word ‘yes’ had been



typed. Defendant admits he is not a citizen of the United States'' (T. 5).<sup>2</sup>

The uncontradicted testimony with regard to this alleged violation is that the witness Carlos W. Helton, who was Supervisor of Stores in charge of the various markets operated by the concern, finding it necessary to arrange for renewal of an off-sale alcoholic beverage license for the concern's store at Oakley, California (a matter which was within his duties as supervisor of the various stores), went to the area office of the California State Board of Equalization at Martinez, California, for that purpose (T. 97-98). A clerk in the office of the said Board typed up a form for Mr. Helton and advised him that it would be necessary to have an officer of the concern sign it<sup>3</sup> and that it should then be mailed to Sacramento (T. 99). Witness Helton took the typed form back to Stockton, had appellant sign it, took it to a notary public, had it notarized (T. 99), and mailed the document as instructed (T. 100). Witness Helton testified that appellant did not read the form before signing it (T. 99-101). This testimony is uncontradicted. Appellant testified to the same effect (T. 124-125). Appellant signs two or three hundred business documents per week (T. 125).

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<sup>2</sup>A reproduction of the application appears at page 30 of the transcript. The various deletions and interlineations on the document were made some time after it was filed with the Board of Equalization (T. 99).

<sup>3</sup>The concern was a partnership (T. 100), and although the form in such circumstances called for the names "of all partners," only appellant's name was typed on this form.

The foregoing is the uncontradicted evidence with reference to the alleged violation of 18 U.S.C. Section 911 which is set forth in count one of the indictment.

Section 911, *supra*, applies, by its express terms, to a representation which is "*wilfully*" made. In overruling the appellant's motion for judgment of acquittal, the trial Court held that appellant "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (T. 8).

The effect of this ruling of the Court below is to hold that one may "*wilfully*" violate the statute by mere carelessness, as distinguished from consciousness and design. Therein, we believe, on the basis of authorities herein cited, the trial Court applied an erroneous rule of law and erred in denying the motion for judgment of acquittal on this count.

**(b) The second count of the indictment.**

Count two of the indictment (T. 3-4) charges that on or about April 14, 1953, appellant "did unlawfully, knowingly, and wilfully falsify, conceal, and cover up by trick, scheme, and device a material fact and made a false, fictitious, and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States, by telling him he was a citizen of the United States of America \* \* \*." Thus, the indictment alleges (a) that the statement was made to

Anderson, and (b) that Anderson was an investigator of the named agency. It is not alleged that it was made while Anderson was acting in a "*matter within the jurisdiction of*" that agency. For reasons hereinafter discussed, we believe not only that this count fails to charge an offense under Section 1001, *supra*, but also that the proof offered does not establish that such an offense was committed.

The Government's proof on this count is that the witness Anderson, on receiving information that appellant claimed to be a native-born citizen of the United States but actually was Jue Bing Cue who was born in China and had come to this country about 1929, searched the immigration records and found a file pertaining to the entry of one Chow Bing Kew into the United States in 1929 (T. 35-36); that he thereupon went to appellant's place of business in Stockton (T. 37, 41) and, after identifying himself, told appellant that he had received information that appellant was not a citizen of the United States and that he was there to check with him to find out (T. 41-43). Anderson's testimony is that appellant then said he was a citizen of the United States and was born in Sacramento (T. 43). Anderson did not at that time administer an oath to appellant (T. 67), did not then take a recorded statement (T. 82), did not then inform appellant of any rights the latter might have in connection with making any statement, but testified that "we do that before we take a formal statement" (T. 77). It was not done at that time (T. 77-78). The regulations, as we shall hereinafter show,

required that all these things be done in connection with such a statement, and statements taken without compliance therewith could not be used in subsequent proceedings before the agency.

On a later date, viz., June 13, 1953, Witness Anderson called at appellant's office in Stockton with other investigators, and at that time a statement under oath was taken from appellant, recorded, transcribed, and signed in conformity with the regulations (T. 48). It is conceded that there was nothing untrue in the statement then made (T. 73).

**(c) The proceedings in the Court below.**

The case was tried without a jury, and following the trial the Court denied motions for judgment of acquittal as to both counts (T. 5-14). Motion in arrest of judgment was then made on the ground that the indictment does not state facts sufficient to constitute a crime against the United States, and this motion, together with motion for a new trial (T. 15-16), was likewise denied (T. 19). The appellant was sentenced on the first count to imprisonment for 18 months and fined \$1,000, and on the second count to imprisonment for 18 months and fined \$5,000, sentences to run concurrently (T. 21-22).

**(d) The questions involved.**

The questions involved on this appeal may be succinctly stated as follows:

(1) Did the Court below apply an erroneous rule of law in finding appellant guilty of wilfully violating



18 U.S.C. Section 911 under count one of the indictment?

(2) Was the evidence sufficient to sustain the conviction on that count?

(3) Does the indictment, in count two thereof, state facts sufficient to constitute a violation of 18 U.S.C. Section 1001?

(4) Does the proof establish that the alleged misrepresentation charged in count two was made in a matter within the jurisdiction of an agency or department of the United States, within the meaning of Section 1001, *supra*?

**(e) Specification of errors.**

Following are the errors intended to be urged by appellant:

(1) The trial Court erred in denying appellant's motion for a judgment of acquittal under count one of the indictment, in that

(a) The Court applied an erroneous rule of law in holding that carelessness on the part of appellant would be sufficient to sustain a conviction of the offense charged;

(b) The uncontradicted evidence relative to count one establishes that there is no wilful misrepresentation on appellant's part.

(2) The trial Court erred in denying appellant's motion for a judgment of acquittal on count two of the indictment, in that the evidence did not establish that the alleged concealment or misrepresentation was

made in a matter within the jurisdiction of a department or agency of the United States within the meaning of 18 U.S.C. Section 1001.

(3) The trial Court erred in denying appellant's motion in arrest of judgment as to count two of the indictment, in that said count does not charge facts constituting an offense under 18 U.S.C. Section 1001 since it is not charged that the alleged concealment or misrepresentation was made in a matter within the jurisdiction of a department or agency of the United States.

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## ARGUMENT.

### I.

#### THE EVIDENCE DOES NOT SUSTAIN THE CONVICTION ON COUNT ONE.

(a) The uncontradicted testimony shows that there was no wilful violation.

Count one of the indictment is based upon 18 U.S.C. Section 911, which provides as follows:

“Whoever falsely and wilfully represents himself to be a citizen of the United States shall be fined not more than \$1,000 or imprisoned not more than five years, or both.”

Thus, it is a specific element of the offense that the representation be “wilfully” made.

In *Spurr v. United States*, 174 U.S. 728, 19 S.Ct. 812, 815, 43 L.Ed. 1150, the Supreme Court said:

“The significance of the word ‘wilful’ in criminal statutes has been considered by this Court. In

Felton v. United States, 96 U.S. 699, 702, it was said: 'Doing or omitting to do a thing knowingly and wilfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it \* \* \*.' "

As stated elsewhere in that opinion, the presence of the word "wilful" in a penal statute "cannot be regarded as mere surplusage; it means something. It implies \* \* \* knowledge and a purpose to do wrong."

To constitute a wilful violation, something more is required than the doing of the act (*Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, 1502).

"A 'wilful' act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. \* \* \*. A wilful differs essentially from a negligent act. The one is positive and the other negative (citing authorities). Simple negligence arises merely from heedlessness, and consists simply of facts of nonfeasance, and is therefore incompatible with wilfulness, which comprises acts of aggressive wrong \* \* \*."

*Black's Law Dictionary* (3d Edition), p. 1848.

The alleged misrepresentation which is the subject of count one of the indictment consists of the typewritten answer "yes" to the question "Are you a citizen of the United States?" in the application for off-sale beer and wine license which appellant signed (T. 30). The uncontradicted evidence shows that this

document was typed by a clerk in the area office of the State Board of Equalization at Martinez, California, when the witness Carlos W. Helton called at that office in connection with his duties as Supervisor of Stores for the Daylite Markets, for the purpose of renewing a liquor license for one of the six stores operated by that concern (T. 97-99). At that time the concern was a partnership (T. 100), consisting of about 14 or 15 partners (T. 101). The young lady who typed the application form in the office of the Board of Equalization at Martinez told Witness Helton it would be necessary to get an officer of the concern to sign it and that it should then be mailed to Sacramento (T. 99). Witness Helton took the typed form back to Stockton, had appellant sign it, took it to a notary public, had the signature notarized (T. 99), and mailed it as directed (T. 100). With regard to appellant's signing the form, Witness Helton testified as follows:

"Q. Did Mr. Wahyou read that document when he signed it?

A. No, he did not.

Q. You have handled many of those documents, have you not?

A. Yes, I have.

Q. You give him many documents from my office to sign?

A. That is right." (T. 97-99)

\* \* \* \* \*

"Q. Mr. Helton, you have stated that Mr. Wahyou did not read that application?

A. No, he didn't, sir.



Q. Did you stand there and watch him sign it?

A. I did.

Q. And you are sure he didn't read it?

A. That is right. I am sure of that, sir."  
(T. 101)

The foregoing testimony is uncontradicted. The appellant also testified that he did not read this document before he signed it (T. 125).

Under the circumstances disclosed by this uncontradicted evidence, we submit that the proof is insufficient to sustain a judgment of guilty on the first count of the indictment. It is unquestionable that the affirmative answer to the question under discussion was typed upon the application form by the clerk of the area office of the Board. It is also indisputable that appellant was not present when this was done. It is shown beyond any doubt that the arrangements in connection with this application were personally made by Witness Helton in the discharge of his duties as Supervisor of the various stores operated by the concern<sup>4</sup>. The uncontradicted testimony is that appellant signed the completed form at the request of Witness Helton without reading its contents. Not only is the evidence all one way on this point, but the

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<sup>4</sup>Although the applicant for the license was a partnership (T. 100) and the form called for the names of all partners, only appellant's name was typed on the form (T. 30). The omission of the names of the other partners (which the form required to be stated), and the fact that citizenship is not a requirement for an off-sale liquor license but is required only for on-sale licenses (California Business and Professions Code, Section 23788), illustrates the informality with which the form was prepared.

testimony in that regard is wholly reasonable. The evidence shows that Witness Helton, as Supervisor of Stores, normally takes care of preparation of documents, obtaining licenses, and such duties (T. 97), and that he gives appellant many documents to sign (T. 100). It is shown that appellant is active in a large number of different business enterprises (T. 110), that he signs two or three hundred documents per week, and whether he reads them first depends on the source and nature of the specific document (T. 125).

It is well-settled that the burden is on the prosecution to establish beyond a reasonable doubt every essential element of the offense, including criminal intent (*Minner v. United States* (CA 10), 57 F.2d 506, 512). The latter element in the case at bar requires evidence that the appellant intentionally made the representation as to citizenship which is contained in the application form, i.e., that the representation was due to wilfulness on his part rather than inadvertence, carelessness, or neglect. Evidence which is as consistent with innocence as with guilt, and which fails to show wilful intent, will not sustain a conviction (*Candler v. United States*, (CA 5), 146 F.2d 424, 426).

In the case at bar, the uncontradicted evidence is that appellant signed the document without reading it, under circumstances which, while they may have amounted to carelessness on his part, fell far short of establishing an intentional and wilful misrepresentation. Indeed, the Court's statement in ruling

on the motion for judgment of acquittal that "appellant is in no position to relieve himself of criminal responsibility because of claimed ignorance; on the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (T. 8), would seem to make it clear that the Court found the appellant guilty on the first count of the indictment on the basis of the Court's belief that even if the act was done carelessly rather than intentionally, guilt would be established. Under authorities cited in the succeeding portion of this brief, we submit that the Court thereby applied a rule of law which the United States Supreme Court and this Court have held to be erroneous under analogous circumstances.

(b) **The conviction of appellant on count one was erroneous in law.**

In *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, the Supreme Court said:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."

In *Bloch v. United States*, 221 F.2d 786 (rehearing denied 223 F.2d 297), this Court applied the doctrine of the *Morissette* case, *supra*, to a conviction for “wilfully” attempting to evade taxes (26 U.S.C. Section 145(b)), and held an instruction erroneous which stated that wilfulness includes “doing an act without justifiable excuse,” or “without ground for believing that the act is lawful,” or “with a careless disregard for whether or not one has the right so to act.”

So also the Court of Appeals for the Third Circuit, considering a similar charge in *United States v. Martell*, 199 F.2d 670, 672, said:

“A wilful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one.”

In *Morissette v. United States*, *supra*, the appellant, a scrap iron dealer, had taken a truck load of metal casings from Government property and sold them. The defendant testified at the trial that he thought the casings had been abandoned. The trial Court had held that this would constitute no defense, since the taking was intentional and the element of intent was presumed from the act of taking. In reversing the judgment, the Supreme Court went on to say:

“It often is tempting to cast in terms of a ‘presumption’ a conclusion which a court thinks probable from given facts. \* \* \* A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.”



In that connection, the Court also used the following expressive language:

“The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.”

We submit that the conviction of appellant on count one of the indictment was erroneous in law, in that the Court concluded that carelessness on the part of appellant would be sufficient to constitute a violation of the statute.

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## II.

### **THE CONVICTION ON COUNT TWO CANNOT BE SUSTAINED.**

Appellant earnestly contends that a violation of 18 U.S.C. Section 1001 as a matter of law was not only not sufficiently alleged in the indictment but was not established by the proof.

We shall consider the proof first, since if the facts do not establish the violation it will be unnecessary to consider the sufficiency of the pleading to charge such a violation.

- (a) **The alleged statement is not within the purview of 18 U.S.C. 1001.**

The pertinent provisions of Section 1001, *supra*, are as follows:

“Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up, by any trick, scheme or device, a material fact or makes any false, fictitious or fraudulent statements or representations \* \* \* shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

It is charged in the indictment that appellant did “falsify, conceal and cover up by trick, scheme and device a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States \* \* \*” (T. 4).

Except for the reference to Anderson as “an investigator of” the named agency, it is not alleged in the indictment that the statement charged was made in a matter within the jurisdiction of the agency, nor that Anderson was acting in such a matter when the statement was made to him. For reasons hereinafter set forth, we submit that Anderson was not so acting at that time within the meaning of Section 1001, *supra*.

Preliminarily, we would point out that the powers of officers and employees of the Immigration and Naturalization Service and the procedures governing matters within the jurisdiction of that agency are prescribed, limited and controlled by specific provisions of statute and regulations.

Section 287 of the Immigration and Nationality Act of 1952 (8 U.S.C. Section 1357) provides as follows:

“(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—

(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; \* \* \*”

Thus, an officer or employee of the Service has power to interrogate only as authorized under the regulations prescribed by the Attorney General, and in accordance therewith.

Sections 242.11 and 242.12 of Title 8 of the Code of Federal Regulations provide as follows:

“Sec. 242.11. *Investigations*—(a) *Persons believed to be subject to deportation*. The case of every person believed to be subject to arrest and deportation shall be investigated by such officer as may be designated for that purpose.

(b) *Purpose of investigation*. The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing that the person investigated is an alien and that he is subject to deportation.

(c) *Recorded statements*.—Whenever, in the course of an investigation, information is obtained which indicates that the person investigated is subject to arrest and deportation, and it is desired to use such information as evidence

in support of an application for a warrant of arrest, such information shall be reduced to writing either in narrative or question-and-answer form and signed by the person furnishing the information. Whenever such recorded statement is to be obtained from any person, the investigating officer shall (1) identify himself to such person, (2) warn the person that any statement made by him may be used as evidence against him in any subsequent proceeding, and (3) place the person under oath or affirmation.

(d) *Refusal to make, or refusal or inability to sign a statement.* Whenever, in the course of an investigation, admissions or statements are obtained from the person under investigation or statements are made by any other person which indicate that the person investigated may be subject to arrest and deportation, but there is a refusal to make a statement under oath or affirmation, or a refusal or inability to sign the statement by name or by mark, the investigating officer shall make a report setting forth the facts admitted or stated. Such report, with any unsigned or unsworn statement which has been reduced to writing, may be used in support of an application for a warrant of arrest if the investigating officer certifies that no other evidence to establish the facts stated in the report can readily be obtained.

Sec. 242.12. *Application for warrants of arrest.* If, after preliminary investigation, the investigating officer determines that a prima facie case for deportation of an alien exists, he shall apply for a warrant of arrest to an officer having authority to issue warrants of arrest."



Thus, under the statute and regulations, an immigration officer, in obtaining information or statements for possible use in a deportation proceeding before the agency, must take a recorded and signed statement under oath, after giving the person to be interrogated the advices specified in the regulations. If the person under investigation refuses to make a statement under oath or refuses to sign such a statement, the investigating officer is required to make a report setting forth the facts admitted or stated, and under those circumstances such a report may be used in support of an application for a warrant of arrest if "no other evidence to establish the facts stated in the report can readily be obtained."

It is well settled that a statement obtained without compliance with the aforesaid provisions of the regulations cannot be used in a deportation proceeding (*Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103).

In the *Bridges* case the alien was ordered deported on the basis of a statement of another individual, which although recorded was not under oath nor signed, and thus had been taken without compliance with a then existing regulation practically identical with paragraph 242.11, *supra*, of the present regulations. In holding that the statement could not be used or considered in the deportation proceeding, the Supreme Court said:

"The rules are designed to protect the interests of the alien and to afford him due process of law."

\* \* \* \* \*

“It was assumed in *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155; 68 L.Ed. 221, 224; 44 S.Ct. 54, that ‘one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.’ We adhere to that principle. For these rules are designed as safeguards against essentially unfair procedures. The importance of this particular rule may not be gainsaid. A written statement at the earlier interviews, under oath and signed by O’Neil, would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription.”

These considerations have since been emphasized by the enactment of the Immigration and Nationality Act of 1952. The legislative history of that statute shows that one of its purposes was to provide “for fair administrative practice and procedure,” specific mention being made, *inter alia*, of Section 242 of the statute (1952 U.S. Code Congressional and Administrative News, p. 1679). Section 242 thereof (8 U.S.C. Section 1252) thus provides that “determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer,” that “no special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions,” that “proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall pre-

scribe," that such regulation "shall include" requirements for (1) reasonable notice of the charges, (2) representation by counsel, (3) reasonable opportunity to the alien to examine the evidence against him, and (4) that no decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence, and that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

It is clear from the statute, therefore, that in a deportation matter the sole and exclusive procedure is to be that which is prescribed by the regulations promulgated pursuant to Sections 242 and 287, *supra*. We submit that in order to constitute a statement made in a matter within the jurisdiction of the Service for purposes of 18 U.S.C. Section 1001, *supra*, the statement must have been made to an immigration officer or employee while said officer or employee is acting in accordance with the procedure so prescribed and required. It is not the mere employment status or title of the officer or employee which renders punishable the making of a false statement to him; on the contrary, such a statement is punishable only if he is acting in a "matter within the jurisdiction of" the agency. He cannot be acting in such a matter if, when the statement is made, he is not following a procedure within the purview of the statute and regulations from which he derives his authority, and when any statement so made to him cannot under those regulations be used or considered in such a matter.



We proceed to examine the circumstances under which the false statement set forth in count two of the indictment is said to have been made. Information had been received by the Stockton immigration office that appellant claimed to be a native-born citizen of the United States but in fact was one Jue Bing Cue, a native of China who had come to this country about 1929 (T. 36). Anderson located a record of the arrival of such a person in 1929 (T. 36-37). Anderson then went to appellant's place of business in Stockton (T. 41), taking the arrival file with him, and after identifying himself to appellant "told him I was there because we had received information that he was not a citizen of the United States" (T. 41) and that "I was there to check with him to find out" (T. 43). Anderson's testimony is that appellant then said he was a citizen of the United States and was born in Sacramento (T. 43). Anderson did not administer an oath (T. 67), did not record a statement (T. 82), and did not inform the appellant of any rights he might have, but testified that "we do that before we take a formal statement" (T. 77-78).

Anderson again called at appellant's office two months later. At that time he took and recorded a statement under oath, in accordance with Section 242.11(c) of the regulations, *supra*, and appellant made a complete and correct statement, which contained no untruth (T. 73). According to Anderson's testimony, "that was a sworn statement, *the usual kind we take*, \* \* \*. \* \* \* Yes, it was typed and he was given an opportunity to read it and he signed—



he initialed each page of the typed statement and signed the last page of it" (T. 48). Anderson further testified, "We do that in all cases of this type, we take a statement from them" (T. 70).

Thus, when Anderson did take the "*usual*" statement, *in accordance with the regulations*, the appellant gave a full, complete and truthful statement (T. 73). The earlier "statement" which is the subject of count two of the indictment is alleged to have been made in a conversation of an informal character, without any compliance with the foregoing provisions of the regulations, and was not the "*usual kind*"<sup>5</sup>.

The narrow question presented is whether any declaration made by appellant to Anderson in the informal conversation of April 14, 1953, was made in a "matter within the jurisdiction of" the Service within the meaning of Section 1001, *supra*. There was no deportation proceeding yet pending, and information gathered in such a conversation *could not have been used in such a proceeding* since it did not comply with the provisions of the regulations (8 C.F.R. Section 242.11; *Bridges v. Wixon*, *supra*). Thus, the interview was held in advance of, and in possible anticipation of, a proceeding before the agency, without, however, any compliance with the procedures prescribed by the regulations for taking preliminary statements for future use in such matter or proceed-

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<sup>5</sup>While Anderson made brief notes for his own use, even those notes contain no mention of the particular statement charged in count two of the indictment (T. 69).

ing. Consequently, it is clear that the conversation which Anderson had with the appellant on April 14, 1953, was entirely exploratory on Anderson's part and not intended for use in such a matter. Nothing which was said there could have been used in a proceeding before the agency, because it did not comply with the requirements of the regulations which were necessary to permit it so to be used.

That immigration officers and employees have no broad inquisitorial powers not specifically granted to them by the statute and regulations is eminently clear from the recent decision of the United States Supreme Court in *United States v. Minker*, 350 U.S. 179, 76 S.Ct. 281, 100 L.Ed. 191. That case involved the question whether immigration officers could compel testimony from a person who was under investigation with a view to a possible denaturalization proceeding. The Government relied on the provisions of Section 235(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. Section 1225(a)) that any immigration officer "shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers \* \* \* concerning any matter which is material to the enforcement of this chapter \* \* \* and to that end may invoke the aid of any court of the United States." In holding that the subpoena power therein granted did not include the power to compel the appearance and testimony of prospective defendants in denaturalization suits, the Court pointed out that such a power is capable of oppressive use, especially when it may be indiscriminately

delegated; that "compulsory ex parte administrative examinations \* \* \* afford too ready opportunity for unhappy consequences to prospective defendants in denaturalization suits," and that since Congress had not provided clearly that the subpoena power extends to persons who are the subject of denaturalization investigations, "therefore Congress is not to be deemed to have done so impliedly."

In his concurring opinion, Mr. Justice Black made the following pertinent observations:

"Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed Congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors (citing cases).

\* \* \* \* \*

"A purpose to subject aliens, much less citizens, to a police practice so dangerous to individual liberty as this should not be read into the Act of Congress in the absence of a clear and unequivocal Congressional mandate."

It is crystal clear from the foregoing that the specific provisions of the statute and regulations are the measure of the power of immigration officers and employees, and that they have no implied power to

engage in inquisitions not specifically authorized by the statutes and regulations. It follows that unless an immigration officer or employee is proceeding in accordance with some authorized procedure prescribed in the law and regulations, it cannot be said that he is acting in "a matter within the jurisdiction of" the agency by which he is employed. We believe that in Section 1001 of Title 18, *supra*, the word "matter" is obviously used as the equivalent of the word "proceeding," and that it is only statements taken or submitted in the course of some authorized proceeding of the agency which can be said to be within the jurisdiction of the agency for purposes of that penal statute. We believe that mere informal exploratory questioning of prospective defendants by investigators under circumstances such as those shown in this case are not within the purview of Section 1001, *supra*.

There are two recent decisions which directly and forcibly support this view. In those cases the defendants had made false statements to agents of the Federal Bureau of Investigation in the course of investigations being conducted by that agency to determine whether there was ground for criminal prosecutions. In each case the defendant was charged with violating Section 1001, *supra*. In each case, after an exhaustive consideration of the legislative history and judicial decisions pertaining to that section, the Court held that the section was not to be construed to extend to cases involving information given or statements made in the course of exploratory interviews where the



agent is merely collecting facts or information to determine whether any action shall be taken by the agency.

*United States v. Levin*, 133 F.S. 88;

*United States v. Stark et al.*, 131 F.S. 190.

In the *Levin* case Circuit Judge Pickett said:

“(1) If the statute is to be construed as contended for here by the United States, the results would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. Sec. 1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States*, 287 U.S. 435, 446, 53 S.Ct.

210, 77 L.Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information.” \* \* \* “8 U.S.C. Sec. 152, now 8 U.S.C.A. Sections 1225(a), 1357(b) (Immigration inspectors with respect to aliens)” ; \* \* \*

“(2, 3) If Section 1001 is to be construed to extend to cases where false statements are made by a person not under oath, then the general perjury statutes and these special statutes would appear to be unnecessary. When the charge involves statements made when not under oath a reasonable and sensible construction of the statute would be to limit its application to persons under *legal obligation to speak* or to give information to representatives of an agency or department of the United States *who have authority to finally dispose of the matter being investigated*, and to cases where the keeping of records or the filing of documents are required or permitted by law. In other cases the perjury statutes are adequate.” (Emphasis added.)

In the case of

*United States v. Stark*, supra,

the Federal Bureau of Investigation had received information to the effect that there had been bribery or attempted bribery of Federal Housing Authority personnel relative to FHA insured property which was being built by the defendants. Agents of the Bureau were detailed to investigate the matter, called

on the defendants, informed them of their rights, advised that any answers they might give might be used against them, placed them under oath, and proceeded to question them with regard to the matter under investigation. The defendants made false statements and were subsequently indicted under Section 1001, *supra*.

The Court in the *Stark* case made a very exhaustive review of the legislative history and the judicial precedents construing Section 1001, *supra*, and said:

“Running through the whole Act there seems to be discussed the congressional purpose to (1) protect the government against false pecuniary claims and (2) as stated in the *Gilliland* case, to protect governmental agencies from perversion of their normal functioning. The purpose seems to be to protect the government from the affirmative or aggressive and voluntary actions of persons who take the initiative, or, in other words, to protect the government from being the victim of some positive statement, whether written or oral, which has the tendency and effect of perverting its normal proper activities. In the instant case the defendants did not volunteer information, they were not seeking any action by the government or making any claim upon it, or for action by its officers against other persons. In this respect the present case is quite distinguishable from any adjudicated case which has been called to my attention.”

\* \* \* \* \*

“I conclude, therefore, that the legislative intent in the use of the word ‘statement’ does not fairly apply to the kind of statement involved in this

case where the defendants did not volunteer any statement or representation for the purpose of making claim upon or inducing improper action by the government against others. Nor were they legally required to make the statement."

The Court concluded that while the Federal Bureau of Investigation did have authority to investigate the subject of the confidential communication relating to the alleged bribery, the statement, under the particular situation there presented, was not one in a matter within the jurisdiction of the Bureau or the Department of Justice "within the meaning of that phrase as contained in Section 1001." The Court went on to say:

"The alleged false information given by the defendants to questions as to whether they had attempted to bribe or knew facts regarding bribery of a government official were not statements for the purpose of inducing action by the government and apparently could not have been the basis for the action actually taken in obtaining indictments for bribery and perjury; nor did the statements defeat the obtaining of such indictments. It seems quite inconsistent with our fundamental concepts of due process in the administration of criminal justice to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein, as a different separate substantive criminal offense under section 1001. The clear purpose of the section was to operate as a shield for defense rather than as a sword for attack.



“The sweeping generality of the language of section 1001, especially when isolated as it appears in the 1948 revision from the remainder of the 1934 amendments, requires caution in applying it to particular situations. In my opinion it is not properly applicable here.”

So in the case at bar the alleged false information given by appellant to Anderson's questions could not have been the basis for the action actually taken in subsequently commencing a deportation proceeding, nor did the alleged statements then made defeat the instituting of such proceeding. As pointed out above, nothing said to Anderson in that conversation could be used or considered in any proceeding to determine whether appellant was or was not deportable, or as a basis for initiating such a proceeding (8 C.F.R. Section 242.11, *supra*; *Bridges v. Wixon*, *supra*). Under the applicable regulations, Anderson was required to proceed in the following manner: Either (1) apply for a warrant of arrest on the basis of information and records obtained from sources other than appellant, or (2) take a statement from appellant in accordance with 8 C.F.R. Section 242.11(c), *supra*, under oath, advising the alien of the possible future use of any statement he might make, have such statement recorded and signed, as required by the regulations, and use such statement “as evidence in support of an application for a warrant of arrest,” or (3) if appellant refused to make a statement under oath or to sign such a statement, make a report to be “used in support of an application for a warrant

of arrest," upon making the requisite certification "that no other evidence to establish the facts stated in the report can readily be obtained" (8 C.F.R. Section 242.11(d), *supra*). Anderson chose none of these courses. He elected to proceed without regard to the regulations (8 C.F.R. Section 242.11) and hold an informal conversation with appellant, which, under the regulations, could serve no official purpose or use in the matter (*Bridges v. Wixon*, *supra*).

The wisdom of the regulations is clearly shown by what happened in the case at bar. When Anderson returned and took the *usual* statement which is prescribed by the regulations, the truth was immediately forthcoming, and the interview elicited no misrepresentation of any sort. That in the previous informal conversation there was not even an attempt to obtain evidence for use in the contemplated deportation proceeding, is clear from two things: First, as has been pointed out above, any such statement so taken could not be used under the regulations, and, second, the basic information in Anderson's possession was that appellant was the person covered by the 1929 arrival file, but Anderson apparently made no attempt to inquire into the question of identity at that time. The conversation was thus no more than a casual effort to "feel out" the appellant.

For the reasons heretofore set forth, we submit that exploratory inquisitions made informally by an immigration employee in advance and in derogation of the procedure prescribed by the governing regulations, cannot be made the basis for prosecution

under Section 1001, *supra*. If statements are to be considered as made in a "matter within the jurisdiction of" the agency, obviously the statements would have to be made in accordance with procedures prescribed for the *use* of statements *in such matters* before such agency. To apply Section 1001, *supra*, to statements made in such informal exploratory conversations under the circumstances here presented would circumvent and do away with the procedures which have been prescribed by the regulations, and would constitute a perversion of the objectives of Section 1001, *supra*. The unfairness which would result is patent; it would mean, for example, that immigration officers and employees could utterly disregard the requirements which Congress in the statute and the Attorney General in the regulations have prescribed for the protection and safeguarding of the rights of aliens, would enable any such officer or employee to use Section 1001, *supra*, as "a sword for attack" (*United States v. Stark*, *supra*), and would give such employees an untrammelled authoritarian power far beyond any to which any judicial tribunal or legislative investigating committee has ever laid claim under our form of government. Indeed, the power of such employees of the executive branch would be comparable to that exercised in police states where absolute power is vested in the executive. We submit that the grossest injustice would be perpetrated by allowing an immigration employee to engage a suspected person in informal conversation, *in disregard of the regulations governing the taking and*



of arrest," upon making the requisite certification "that no other evidence to establish the facts stated in the report can readily be obtained" (8 C.F.R. Section 242.11(d), *supra*). Anderson chose none of these courses. He elected to proceed without regard to the regulations (8 C.F.R. Section 242.11) and hold an informal conversation with appellant, which, under the regulations, could serve no official purpose or use in the matter (*Bridges v. Wixon*, *supra*).

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*use of statements in proceedings before the agency*, and thereby render the alien subject to a long term of imprisonment and large fine, such as was imposed in this case, because the alien falsely protests his innocence under those conditions.

The case of *United States v. Moore*, (CA 5), 185 F.2d 92, furnishes further support for the proposition that statements obtained in "exploratory searches" are not within the purview of Section 1001, *supra*.

In that case the indictment charged that "in a matter within the jurisdiction of the Wage and Hour Division" during the course of an inspection of their business, duly authorized under the Fair Labor Standards Act, the defendants falsified, concealed, and covered up material facts. The District Court had granted a motion to dismiss the indictment on the ground that the falsification was not shown to be in a matter within the jurisdiction of the agency. In considering the matter on appeal, the Court of Appeals said, with reference to former Section 80 (now Section 1001, *supra*):

"None of its provisions purport to or do have to do with exploratory searches as here made for the purpose of determining whether any agency has jurisdiction."

The Court of Appeals concluded, however, that since jurisdiction of the agency was specifically alleged in the indictment, this was sufficient to require a trial of the issue to determine from the proof whether the statements were made in a matter within the juris-

diction of the agency within the meaning of Section 80, *supra*.<sup>6</sup>

In the case at bar, not only is there no affirmative allegation in the indictment that the alleged falsification was made in a matter within the jurisdiction of the agency, but the proof shows that it was made in the course of an "exploratory search" under circumstances whereby any statement then made *could not be used in any matter or proceeding before the agency*.

Cases such as *Cohen v. United States*, (CA 9), 201 F.2d 386, (certiorari denied 345 U.S. 951, 73 S.Ct. 864, 97 L.Ed. 1374), and *Knowles v. United States*, (CA 10), 224 F.2d 168, are readily distinguishable since those cases involved the submission by the accused of false financial statements during the course of a regular proceeding to determine the matter of tax liability. Obviously, the financial statements in those cases were not only required by law to be furnished, but were submitted for the purpose of being used and considered by the officials with power to determine the matter in reaching a final decision upon the ultimate issue. For example, in the *Cohen* case the Treasury Department, which had been examining into the appellant's tax liability, had asked for a net worth statement to determine such liability. In a conference before the Treasury Department with appellant's tax adviser, the statement was discussed at great length and signed and filed by the taxpayer

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<sup>6</sup>We are informed that after the above cited decision in that case the Government dismissed the charges.

as proof of his net worth. Obviously, there is no similarity between such a situation and that in the case at bar. The *Knowles* case, *supra*, involved a similar situation, i.e., a statement made in the course of an authorized inquiry into the correctness of the taxpayer's return. Circuit Judge Pickett, who decided the *Levin* case, *supra*, also participated in the Court of Appeals' decision in the *Knowles* case, and that Court placed its decision in the latter case "squarely upon the premise that the statement was made in pursuance of statutory requirements." Thus, these two decisions are not in conflict.

In the case at bar, the Court below also cited the case of *Marzani v. United States*, 168 F.2d 133 (affirmed by an equally divided Court—335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431). The distinction between that case and such situations as are here presented is clearly stated by Circuit Judge Pickett in his opinion in the *Levin* case, *supra*, as follows:

"On appeal the Court of Appeals pointed out that the proceeding in which the false statements were made was in the nature of an appeal from the request for a resignation. The false statements were made to an officer who had the authority to make a final disposition of the pending matter by one employed or entitled to employment by the United States. It is clearly distinguishable from a situation where the representative of the department or agency of the United States is merely collecting facts or information to determine whether any action shall be taken by that agency or department, or to sustain action which has been taken."



His Honor Judge Pickett also said in the opinion in the *Levin* case:

“No decision has been found which holds that the failure to tell the truth to an agent or representative of a department or agency of the United States by a person under no legal obligation to speak, is a violation of Section 1001.”

In the case at bar, the appellant was not only under no legal obligation to speak on the occasion referred to in the indictment, but any declaration made by him at that time under the circumstances in which the conversation took place could not possibly have been used or considered by the agency in making its determination; the governing regulations of the agency prohibited its use or its consideration in making that determination.

A perhaps extreme (but logical) example will illustrate the clear line of distinction between situations such as those in the *Levin* and *Stark* cases and the case at bar on the one hand, and those in the *Cohen* and *Marzani* cases on the other, and the equally clear distinction between power to investigate and jurisdiction to decide. If Section 1001 covers statements made to any employee authorized to investigate, regardless of the statement's relationship or lack of relationship to the function of decision, then it would follow that a speeding motorist in a National Park who might misstate his rate of speed to an intercepting Forest Ranger could be convicted thereunder and imprisoned for five years and fined \$10,000 for that misstatement (a penalty greater than that provided

for perjury). It is such absurd consequences which were envisioned by the Court in the *Levin* case if the statute were to be broadly interpreted. On the other hand, the reasonable intent of Section 1001 would seem to be that it applies to any statement or representation made *in connection with or having some bearing upon an agency's function of decision* of some matter which is within its jurisdiction to determine.

We submit that for all the foregoing reasons, the proof failed to establish the offense charged. If we are correct in that conclusion, there is no need to consider the sufficiency of the indictment with regard to its second count. We shall, however, briefly point out authorities which we believe show beyond any doubt that the indictment is insufficient to charge an offense under that section.

**(b) The sufficiency of the indictment.**

“An indictment is required to set forth the elements of the offense sought to be charged.”

*United States v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92.

“The indictment must contain a definite statement of the essential facts constituting the offense charged.”

\* \* \* \* \*

“A bill of particulars may make specific a statement that is too general, but it cannot supply the omission from an indictment of a fact that

constitutes an essential element of the crime intended to be charged.”

*United States v. Williams*, (CA 5), 203 F.2d 572, 574, (Cert. denied 346 U.S. 822, 74 S.Ct. 137, 98 L.Ed. 347).

“We are aware that liberality is the guide today in testing the sufficiency of an indictment, but this applies to matters of form and not of substance. We cannot dispense with the requirement that the indictment charge all essential ingredients of a crime. See *Hagner v. United States*, 285 U.S. 427, 433; 52 S.Ct. 417; 76 L.Ed. 861; *U.S. v. Debrow*, 346 U.S. 374, 376; 74 S.Ct. 113; 98 L.Ed. 92.”

*United States v. Tornabene et al.*, (CA 3), 222 F.2d 875, 878.

In the case at bar, the indictment alleges that the falsification or representation was made “to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice” (T. 4). This is no more than stating that Anderson’s occupation was that of an investigator of that agency. It is not alleged in terms that the representation was made in a matter within the jurisdiction of that agency, nor that when it was made to Anderson he was acting in a matter within the jurisdiction of that agency.

In *Lowe v. United States*, (CA 5), 141 F.2d 1005, the Court of Appeals reversed a judgment which had been entered on a plea of *nolo contendere* because the indictment did not state facts sufficient to show

that the misrepresentation was made in a matter within the jurisdiction of a department or agency of the United States.

Similarly, in *Hammer v. United States*, (CA 5), 134 F.2d 592, wherein the case had been tried in the Court below without a jury, it was also held that an indictment which did not charge facts sufficient to constitute a material concealment from a Government agency could not stand on appeal.

We have heretofore discussed the sufficiency of the proof to show that the statement or representation was made in a matter within the jurisdiction of the agency. We submit that the indictment by simply charging, without more, that the statement was made to Anderson, who was an investigator of the agency, is insufficient as an allegation of the necessary element that the statement must have been made in a matter within the jurisdiction of the agency. This is particularly true when it appears from the proof that the statement was one which by regulation could not have been used or considered in any determination to be made by the agency. We submit that this defect in the indictment is as to a matter of substance and not as to form, and that consequently the indictment is fatally defective in that respect.

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### CONCLUSION.

The gravity of the legal issues presented by this case, and the seriousness of its consequences to appellant, are apparent. Broadly, the issues are whether



a person (a) can legally be convicted of *wilfully* violating a criminal statute on the basis of uncontradicted evidence which shows no more than carelessness (however "brash"—T. 8) in signing a business document in a somewhat routine manner, and (b) can legally be convicted (and imprisoned for a long term) because he told an untruth to an investigator in an informal conversation which under the applicable law and regulations could not be used or considered in determining any issue presented to the Government agency involved, in any matter within its jurisdiction to decide.

The conviction must stand or fall on the basis of those two specific acts on the part of appellant. We earnestly submit that under the circumstances shown by the evidence in this case, neither act, as a matter of law, constituted a violation of the penal statutes involved.

It is respectfully submitted that the judgment of the Court below should be reversed.

Dated, Stockton, California,  
December 1, 1956.

Respectfully submitted,

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KENNETH G. MCGILVRAY,  
ARTHUR J. PHELAN,  
*Attorneys for Appellant.*



No. 15,251

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CHOW BING KEW,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the United States District Court  
for the Northern District of California.

BRIEF FOR APPELLEE.

---

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**On Appeal from the United States District Court  
for the Northern District of California.**

**BRIEF FOR APPELLEE.**

---

For the sake of convenience, the topical form used in the Brief for Appellant will be followed herein.

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**STATEMENT OF THE CASE.**

The appellant, an alien residing in the United States, was indicted by the Grand Jury in a two count indictment. Count one charged a false claim of citizenship, 18 USC, Section 911. (T. 3.)

The government introduced in evidence an Application for Alcoholic Beverage License (T. 30) which in-

licated that Sam Wah You (appellant), sought an Off Sale Beer and Wine License and that he was a citizen of the United States, the word "Yes" having been typed after the question, "Are you a citizen of the United States?" This application was verified.

The second count of the indictment charged a violation of Title 18 USC, Section 1001, in that appellant made a false statement or representation to an investigator of the Immigration and Naturalization Service of a material fact by telling the investigator he was a citizen of the United States of America, knowing such statement or representation to be false, etc.

The government witness, Mr. Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, testified that on or about April 14, 1953, at Stockton, California, he went to appellant's place of business, identified him, and told appellant "that I had received information that he wasn't a citizen of the United States and I was there to check with him to find out. And he said, 'I am a citizen of the United States. I was born in Sacramento, California.' And he continued to say that I could verify it myself if I wanted, I could find the record in Sacramento." (T. 43.) Mr. Anderson further testified that appellant stated he was born July 7, 1914, and gave the name of his father and mother. Appellant also stated that he had made a trip to China recently and if Mr. Anderson wanted he could check with the State Department and he would find a United States Passport had been issued to him.

Shortly thereafter Mr. Anderson left and checked the information given. Further investigation indicated that appellant was not a citizen, although he claimed to be. The evidence indicated that appellant had apparently assumed the identity of Donald H. Wahyou who had died at the age of eleven months, fifteen days on November 18, 1918. (T. 33 and Exhibit No. 3.)

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## ARGUMENT.

### I.

#### THE EVIDENCE SUSTAINS THE CONVICTION OF COUNT 1.

(a) The evidence is abundantly ample to show there was a wilful violation.

Appellant contends that wilfulness is a specific element of the offense of a false claim of citizenship and cites as his chief authority *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 1502, but immediately digresses and cites *Black's Law Dictionary* (3d Edition), p. 1848. Turning to the language of the Court in the *Screws* case, the pertinent portion is found on page 101:

“We recently pointed out that ‘willful’ is a word ‘of many meanings, its construction often being influenced by its context.’ *Spies v. United States*, 317 U. S. 492, 497. At times, as the Court held in *United States v. Murdock*, 290 U. S. 389, 394, the word denotes an act which is intentional rather than accidental. And see *United States v. Illinois Central R. Co.*, 303 U. S. 239. But ‘when used in a criminal statute it generally means an act done

with a bad purpose.' *Id.*, p. 394. And see *Felton v. United States*, 96 U. S. 699; *Potter v. United States*, 155 U. S. 438; *Spurr v. United States*, 174 U. S. 728; *Hargrove v. United States*, 67 F. 2d 820. In that event something more is required than the doing of the act prescribed by the statute. Cf. *United States v. Balint*, 258 U. S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. *Spurr v. United States*, *supra*, p. 734; *United States v. Murdock*, *supra*, p. 395. And that issue must be submitted to the jury under appropriate instructions. *United States v. Ragen*, 314 U. S. 513, 524."

The importance of the Court's consideration of the meaning of the word "wilful" is that the issue must be submitted to the trier of fact under appropriate instructions. In the instant case the trier of fact was the Court. Instructions, of course, are inappropriate. The Judge is presumed to know the law. We are, therefore, entitled to assume that all appropriate law was applied by the trier of fact to the various inferences that may be derived from the evidence, including that of wilfulness and that the conviction was proper. See also *Spies v. United States*, 317 U. S. 492, 500, and *United States v. Murdock*, 290 U. S. 389, 396. The singling out by appellant in his brief of the words found in the Court's ruling on the motion for judgment of acquittal that "appellant is in no position to relieve himself of criminal responsibility because of claimed ignorance; on the contrary, his brash carelessness, if such be the case, empha-



sizes his criminality” (T. 8, Appellant’s Brief, p. 13), is an attempt to seize upon words used by the Court that are not set forth as the sole reason for its decision; the words “if such be the case” indicate definitely that the Court believed appellant’s actions to be wilful rather than due to his “brash carelessness,” which was the appellant’s alleged defense.

Appellant’s contention that the evidence is uncontradicted that the Application for Alcoholic Beverage License signed by the appellant was made without reading it and under circumstances which amounted to carelessness is far from the truth.

It must be remembered that the Court sitting as the trier of fact had before it appellant’s witness Carlos W. Helton, who is appellant’s supervisor of stores, testifying that he gave appellant many documents to sign (T. 100); that he had the Application for Alcoholic Beverage License prepared; that there were no scratch outs on it when he mailed it (T. 99); that with all of the various documents that he prepares and presents to appellant Helton testified appellant did not read the Application (T. 100); that the Application was for the Daylite Market in Oakley, which was a partnership (T. 100), composed of fourteen or fifteen partners. (T. 101.) The Court as the trier of fact also had before it the document in question which was Exhibit 1 (T. 30), which shows on its face that the name of the applicant was Sam Wah You and that there were no other names of partners as required on the face of the document. The Court also had before it on the face of the same docu-

ment the notarized signature of appellant to the statement that "I have read the foregoing application and know the contents thereof and each and all of the statements therein made are true; (3) that no person other than the applicant or applicants has any direct or indirect interest in the applicant's or applicants' business to be conducted under the license(s) for which this application is made." In addition to the documents which in many ways tend to refute Mr. Helton's phenomenal memory, if not his veracity, the Court had as evidence appellant's continued false claims of citizenship from his sworn statement of March 3, 1947, that he was born at Sacramento, California, when he obtained a passport. (T. 46, Exhibit No. 6.) Appellant testified that he was fully advised by counsel before he admitted his false claim of citizenship in a statement to Mr. Anderson in 1953 (Exhibit 7), and that after that time his attorney told him not to discuss with anybody his place of birth unless he (the attorney) were present. He further testified that he couldn't sign papers unless his attorney said yes. (T. 137.) The Court could remember that appellant testified after June, 1953, he had never told anyone he was born in Sacramento (T. 138) and he was definite that he had not. Appellant was then confronted with an application for \$150,000 worth of insurance (Exhibit 9) in which it was stated appellant was born in Sacramento, California, the signature admittedly being that of applicant. A similar application for \$100,000 worth of insurance containing the same allegation of birth is Exhibit 10. Appellant testified that he told the doctor the answers to certain

questions (T. 142, 143), but that he did not read the application or know anything about the allegation of birth. It is apparent that appellant is not adverse to using a false claim of citizenship if it will assist him financially.

From these few comments upon the evidence, it is obvious the trier of fact had abundant circumstances to consider with the physical and oral evidence to lead him to believe appellant's false claim of citizenship was wilful.

The issue then of wilfulness was squarely presented to the Court, who knew the law, and as the trier of fact properly applied the law and found the appellant guilty.

Apparently appellant is not raising the point that Section 911 of Title 18 USC is inapplicable to a false claim such as was made on Exhibit 1. (T. 30). In any event, the following cases are analogous to or authoritative to the propriety of the use of the Section in count one of the indictment. *Smiley v. U. S.*, 181 F. 2d 505 (9 Cir. 1950), *De Pratu v. U. S.*, 171 F. 2d 75 (9 Cir. 1948), *U. S. v. Tandaric*, 152 F. 2d 3 (7 Cir. 1945.)

## II.

**THE CONVICTION ON COUNT TWO SHOULD BE SUSTAINED.**

(a) The statement made by appellant to investigator is within the purview of 18 USC 1001.

We now turn to the second count in the indictment and to the applicability of Section 1001 of Title 18 USC to the facts adduced at the trial.

In his official capacity as an investigator of the Immigration and Naturalization Service, Mr. Roy R. Anderson was told by the defendant (appellant) he was a citizen of the United States, born at Sacramento, California. Section 1001 makes it unlawful to knowingly make a false or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States.

There is no question but what the Immigration and Naturalization Service of the United States is a department within the meaning of the Statute and a statement made concerning citizenship to an investigator of that department which is primarily interested in matters pertaining to citizenship, is a material matter. In fact, it would be difficult to find an instance where a statement or representation by an individual would be more material to a department of the United States than is a statement concerning citizenship to the Immigration and Naturalization Service. Again, there is no question as to the misrepresentation, as appellant has admitted that he is not and never has been a citizen of the United States.



A false representation need not be in any particular form and may be oral, and it does not matter whether the government or any of its employees were deceived, the government lost anything of value, or the defendant gained anything of value by his act. *U. S. v. Meyers*, 131 F. Supp. 525, 531.

As pointed out in appellant's brief at page 17, Section 287 of the Immigration and Nationality Act of 1952, (8 U.S.C. Section 1357) provides:

“(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—

“(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; \* \* \* ”

It is argued that an officer or employee of the Service has the power to interrogate only as authorized under the regulations prescribed by the Attorney General. Obviously, this is a strained and inaccurate reading of the Section. The words “authorized under regulations prescribed by the Attorney General” refer to any officer or employee of the Service as set forth in paragraph (a) of Section 1357 and not to be added after the word “interrogate” contained in subsection 1. Grammatical construction alone prevents such an interpretation.

In any event, carrying on an academic discussion concerning Section 1357 is lacking in merit since broad authority to interrogate, take an oath, take oral evi-

dence and even written evidence, if necessary, is conferred upon an Immigration Officer by Title 8 U.S.C., Section 1225 (a). The pertinent portion reads as follows:

“\* \* \* The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence.”

It should be noted that this Section is entitled “Inspection by Immigration Officers—Powers of Officers.”

The term “immigration officer” is defined in Section 1101 (a) (18) of Title 8 USC, as follows:

“The term ‘immigration officer’ means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.”

Title 8, Code of Federal Regulations, Section 1.1 (9) states:

“The term ‘immigration officer’ means:

“(i) Any officer or employee of the Service who, on December 24, 1952, was serving under

appointment theretofore made to the position of immigrant inspector, patrol inspector, investigator, naturalization examiner, or any other officer of the Service of a higher grade, whose appointment has not terminated, or who hereafter is appointed to such position; \* \* \*”

Since there is no disput but that Mr. Anderson was an investigator at the time of the interrogation of appellant, he is an immigration officer having the power to interrogate any alien concerning his right to reside in the United States. The false statement to Mr. Anderson immediately tended to cut off his inquiry, since citizenship carries with it the right to remain in the United States.

The obvious reason for the defendant's false statements was to cloak himself with a mantle of citizenship and thus enable him to carry on his various successful businesses.

Defendant's sole defense was an attempt to show that he actually believed he was entitled to claim he was a citizen of the United States. In the light of his own testimony, only the most naive person could put any credence in this allegation. A few examples of defendant's testimony will indicate the absurdity of this view. To begin with, the defendant is an intelligent individual who has shown himself capable of dealing successfully in several competitive businesses. He is not a person who acted through ignorance, but is obviously a man who, through the use of money, sought to use legal machinery to circumvent the laws of this country.

When the defendant first landed in the United States at Stockton he met a person named Jung Wah You, also known as Charlie Wah You. Appellant stated he liked him very much; that he was a hundred per cent Americanized, and talked English exclusively. (T. 114.) Almost immediately they discussed citizenship, although it was unexplained how one individual speaking English, and the other speaking Chinese managed to do this. Charlie Wah You told him that he could not become a citizen because he came from China, but that he would talk to a lawyer to see if he could get him to be a citizen. From the appellant's testimony, this went on for a number of years until 1934 when Charlie Wah You wrote him that he could be a citizen for \$500.00. (T. 116.) Apparently, the appellant made great to-do about wanting a paper that would show that he was legally in this country. A lawyer was contacted and the appellant "asked him through Charlie Wah You, because at that time I can't speak very good English, and part Chinese and part English" (T. 117), which, as pointed out before, was a neat trick of Charlie Wah You who couldn't speak Chinese. The upshot of this was that Charlie Wah You perjured himself by claiming the appellant as his son and that he was born in Sacramento, California. (See the Petition to the Superior Court in Exhibit "B".) After the decree establishing birth was obtained, based upon the perjury of Charlie Wah You, "the 100 per cent American," appellant claims he checked with another lawyer in Oregon by the name of William Pluhaty, and



told him that he had been adopted and asked if that was legal. It is inconceivable to me that any lawyer would advise as to the legality of this matter, or that Mr. Freitas, who obtained the order establishing birth, would make the statements attributed to him on page 121 of the Transcript of Record. Conveniently, both lawyers and Charlie Wah You are deceased and are unable to defend themselves from any allegations made by the appellant. It does appear that Mr. Freitas was paid \$200.00 by the appellant for representing Charlie Wah You and that Charlie Wah You was given money by him. (T. 130.) One is left with the impression that the appellant "doeth protest too much" to be believed.

It is interesting to note appellant's reaction to a question by his attorney (T. 127), "Now, at that time did you tell him that you were a citizen of the United States?" The question was referring to the visit of Mr. Anderson in 1953. Answer: "I don't think so, definitely I say no. I told him I born in Sacramento." An extraordinary memory for exact words that might make a technical distinction with respect to this action. Contrast this with the evasiveness evidenced by the appellant concerning a vital matter to him that occurred not in 1953, but in March of this year. Of course, the question was unexpected and a convenient excuse had not been prepared. (See T. 137-138.) "Did you after July, 1953, tell anyone that you were born in Sacramento?" Answer: "No, sir." The appellant was then shown an application for insurance and two forms of statement to medical examiner. (Ex-

hibits 9, 10, and 11), in which, even after this matter was pending, appellant was still falsely claiming to be born in the United States and thus obtain insurance which he most likely would not have been granted otherwise.

It is inconceivable to me that appellant did not know what he was doing in matters involving \$150,000 and \$100,000.

Count two, which charges violation of Section 1001 of Title 18 USC, is a broad Statute. Precise words such as "I am a citizen of the United States" would not be necessary to fall within the Statute or the charge of the Indictment. There is testimony by Mr. Anderson that the precise words were used and the statement of the appellant that he said he was born in Sacramento. For sake of argument, if this allegation of the appellant were accepted as true, violation of Section 1001 is admitted, since birth in the United States carries with it citizenship and that is what appellant wanted all to believe.

The contention of appellant that Sections 242.11 and 242.12 of Title 8 of the Code of Federal Regulations are in any way binding upon the activities of Roy R. Anderson as an investigator for the Immigration and Naturalization Service is wasted effort. They have absolutely no applicability to the issues in this case, since we are not concerned with the various requirements apparently encountered in deportation proceedings, and, as pointed out above, could only conceivably result from the misconstruction of the language contained in Section 1357 (a) and (1) of Title

8, USC, and are, in any event, immaterial in the light of 8 USC 1225 (a). The cases such as *Bridges v. Wixon*, 326 U. S. 135, are not relevant to the issues herein and no further comment is necessary.

The cases cited by appellant such as *U. S. v. Levin*, 133 F. Supp. 88, *U. S. v. Stark, et al.*, 131 F. Supp. 190, are of no comfort to appellant. These cases are merely authority that Section 1001 of Title 18 USC is not violated by the giving of false information to a strictly investigative agency such as the Federal Bureau of Investigation which has no final disposition of most matters being investigated. The Immigration and Naturalization Service is a department of the United States which has authority to finally dispose of matters of citizenship or lack thereof which are being investigated by its officers or employees, and Section 1001 is applicable. *Cohen v. U. S.*, 201 F. 2d 386 (9 Cir.), and *Knowles v. U. S.*, 224 F. 2d 168 (10 Cir.).

**(b) The sufficiency of the indictment.**

“The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. \* \* \*” Rule 7 (c) of the Federal Rules of Criminal Procedure.

In commenting upon this Rule, Judge Denman in *Elwert v. U. S.*, 231 F. 2d 928 (9 Cir.), at page 931 says:

“An indictment meets the requirements of the Fifth Amendment and Rule 7 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., if it

charges all the essential elements of the crime clearly enough to enable the defendant to prepare his defense and to plead the judgment in bar to a future prosecution for the same offense. *Todorow v. United States*, 9 Cir., 1949, 173 F. 2d 439, 446-447. The sufficiency of an indictment is tested by practical considerations, and defects not affecting substantial rights are disregarded."

See also *Fisher v. U. S.*, 231 F. 2d 99, (9 Cir.).

"An indictment which charges a statutory crime by following substantially the language of the statute is amply sufficient provided that its generality neither prejudices defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy, and such rule is especially applicable after verdict." *U. S. v. Franklin*, 188 F. 2d 182, 186.

See also *Smiley v. U. S.*, 9 Cir., 181 F. 2d 505; *Brown v. U. S.*, 222 F. 2d 293, 9 Cir.

Count two of the indictment in question here follows in general the language of the Statute. It is obviously sufficient to enable appellant to prepare his defense, since a Bill of Particulars was not demanded and the defense was made and it is sufficiently definite to enable appellant to plead the judgment in bar to a further prosecution for the same offense. The question of the jurisdiction of the matter within any department is a question of evidence and the mere allegation of that portion of the Statute would not affect the substantial rights of the appellant. As Judge Denman stated, "The sufficiency of an indict-



ment is tested by practical considerations \* \* \*". The allegation in the indictment that appellant wilfully falsified "a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States, \* \* \*" was sufficient. What appellant is seeking is in the nature of evidence and not a requisite part of an indictment.

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### CONCLUSION.

It is respectfully submitted that the finding of guilty on both counts of the indictment by the learned District Judge is abundantly supported by the law and the evidence and the judgment of the court below should be affirmed.

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IN THE

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FILED

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No. 15,251

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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CHOW BING KEW,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**On Appeal from the United States District Court  
for the Northern District of California.**

**APPELLANT'S REPLY BRIEF.**

---

**I.**

**THE FIRST COUNT.**

Appellee's argument in substance is that the trial Court did not rest its judgment solely on the "carelessness" of appellant, and that the trial Court must be presumed to have properly applied the law. Appellee also contends that there were circumstances from which the trial Court could have found that the representation referred to in Count One was intentionally made.

The statute (18 *U.S.C.*, Section 911) punishes false representations only when "wilfully" made. The de-

fense was that appellant signed the license application without reading it and was unaware of its contents. The trial Court based its judgment (T. 14-15) upon "the findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal." Those findings and conclusions on the issue now under discussion are as follows:

"Defendant testified that he signed the application for a liquor license without reading it because it was his practice to sign any such document presented to him by his employees or by his attorney. This glib accused who described himself as the president of several corporations operating supermarkets as well as engaged in the business of 'General merchant, grocery store, meat market, furniture store, drug store, department store, cattle business, rancher, and Northwestern Development Company, uranium business, farmer' and who has amassed a fortune of half a million dollars while so engaged, is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality." (T. 8).

Since it is an essential element of the offense charged that it be "wilfully" done, the foregoing statement, if given to a jury as an instruction, would unquestionably have constituted fatal error (e.g. *Bloch v. United States*, 221 F. 2d 786, Rehearing denied 223 F. 2d 297). True, there was no jury in the case at bar. However, a Court as well as a jury may apply an erroneous rule of law. We cannot read the foregoing ruling of the trial Court as meaning any-

thing but that if the defendant signed the document without reading it, he was brashly careless and in that event his ignorance of its contents would not constitute a defense. If the Court applied such a rule of law, it seems clear, under the authorities cited in appellant's opening brief, that the judgment of conviction on Count One cannot be sustained. A Court may not "enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute" (*Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). Here one of the components contemplated by the words of the statute is that the representation be "wilfully" made. Carelessness, therefore, is not enough to constitute the offense (*Bloch v. United States*, *supra*).

A consideration of the present record shows rather clearly that the trial Court concluded, not that the representation was intentionally made, but that, if the document was signed under the circumstances disclosed by the evidence, appellant's ignorance of its contents would be no defense. This seems evident, not only from the language of the Court in its finding quoted above, but from the evidence with respect to the particular document (T. 30) which was involved. It is unquestionable that the document was prepared in the office of the Board of Equalization at Martinez, California by a clerk in the Board's office, from data furnished to her by the witness, Helton, who was Supervisor of the various stores operated by appellant's company. Appellant was not present when the

form was prepared, and did not participate in its preparation. The obtaining of necessary licenses for the various stores was a part of the duties of the witness, Helton. The completed form was later presented to appellant at Stockton, California by witness Helton, and the testimony, both of witness Helton and of appellant, is that appellant did not read the form before signing it (T. 99-100, 101). Appellant is active in a large number of business enterprises (T. 110) and is called upon to sign several hundred business documents weekly, some of which he does not read before signing, depending on the nature of the document and by whom it has been prepared (T. 125). Such reliance upon an employee in matters of administrative detail is not at all uncommon in the business world, particularly where the matter is of a category for which the employee is primarily responsible.

Upon this state of the record, the question whether appellant knew when he signed the document that it contained the particular statement upon which Count One is based, was directly presented. The findings and conclusions of the trial Court are quoted above. We see no escape from the conclusion that the trial Court decided this issue on the theory that if the appellant signed the form without reading it, he was brashly careless and that such carelessness would amount to a wilful violation of 18 U.S.C. Section 1001.

Obviously, if the trial Court decided the issue under such a concept of the law, the trial Court ap-



plied an erroneous test of wilfulness, and the conviction cannot be sustained. We submit that it is clear from the record in this case that such an erroneous theory of law was applied by the Court below, and that for this reason, the conviction on count one must be reversed.

The cases of *Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418, and *United States v. Murdoch*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381, cited in appellee's brief lend no support to appellee's argument. In both those cases convictions were reversed for failure of the trial Court to give proper instructions as to what constituted wilfulness. These decisions actually bear out appellant's contention that more than negligence is required to constitute a wilful violation. And if the trier of fact, whether Court or jury, has applied the erroneous theory that a wilful violation can be constituted from mere carelessness, then we submit, the conviction cannot stand. We think such a situation is presented in the case at bar.

Regarding appellee's contention that there were circumstances which could lead the trial Court to believe that the representation was wilful, we would point out that apparently the Court believed, not that wilfulness was present but that carelessness was enough. Moreover, under the circumstances shown with respect to the preparation and execution of the particular document referred to in Count One, it is far more probable that appellant did not read the document before signing it than that he did read it. The

evidence in this particular respect is at least as consistent with innocence as with guilt and would consequently not sustain the conviction (*Candler v. United States* (CA5), 146 F. 2d 424, 426).

If it be contended that the mere execution of the form by appellant gave rise to a presumption or inference that he knew its contents, and that the trial Court could have arrived at its judgment on that basis, the answer is quickly apparent. Such a presumption or inference "disappears when substantial evidence to the contrary is produced" (*Silverton v. Valley Transit Cement Co., Inc.* (CA9), 237 F. 2d 143, 144).

Although in a civil case presumptions may sometimes fix the burden of proof, they may not do so in a criminal case on the main issue; for there, on a plea of not guilty, the burden and quantum of proof to establish the corpus delicti and the defendant's guilt never shifts. To sustain conviction on circumstantial evidence, proof must not only be consistent with defendant's guilt but it must exclude every reasonable hypothesis of his innocence (*Ezzard v. United States* (CA8), 7 F. 2d 808).

An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence, which is not open to doubt, even though such evidence is produced by the opposite party (*Engstrom v. Auburn Auto Sales Corp.*, 11 Cal. 2d 64).

"It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks pro-

bable from given facts. \* \* \* A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense."

*Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288.

Appellee refers to the fact that the application for liquor license (T. 30) does not show the names of the other partners in the concern, as called for by the form. But that circumstance is not evidence that appellant knew its contents. The concern held a sales tax permit issued by the Board of Equalization which showed all the partners (T. 155), some of whom are citizens (T. 154-155), and the omission of the other names from this particular form is plainly without significance on the issue under discussion. Moreover, citizenship of the parties is relevant only where application is being made for an *On Sale* license (*Calif. Business and Professions Code*, Sec. 23788), and the fact that the form was incompletely filled out by those preparing it has no tendency to prove an intentional misrepresentation on appellant's part. Not only did he have no hand in preparing the form, but all the testimony regarding that document is that matters relative to obtaining licenses were among witness Helton's duties as Supervisor of the concern's various stores, and that appellant signed the form as presented to him by Helton without reading it.

Appellee argues that the trial Court could consider that in 1947 appellant had obtained a passport by claiming to be a citizen. But if on the occasion

charged in Count One of the indictment appellant unwittingly signed the document without knowledge of its contents, an incident far beyond the bar of the statute of limitations should not be thrown into the scales against him. We are not unmindful of the rule that under certain circumstances evidence of similar acts may be admitted to show intent. But here it appears that the trial Court in adjudging appellant guilty of the charge set forth in Count One of the indictment was laboring under a legal misconception, i. e. that carelessness was sufficient to establish guilt, a proposition which has been rejected by this Court (*Bloch v. United States, supra*). As a result the case was tried upon a fictitious issue, viz: the issue of carelessness, instead of the true issue of whether appellant "wilfully" committed the particular act charged. Appellant, we submit, is entitled to a trial on the true issue, regardless of what he may or may not have done on other occasions. If in fact he is not guilty of the offense charged in the indictment, he should not be caught in the backwash of an old misdeed.

Finally, appellee refers to evidence that appellant has taken out policies of life insurance showing his birthplace as Sacramento, California. In the situation here presented we submit that this is wholly without significance. Such a misstatement does not constitute a criminal offense (*Smiley v. United States*, (CA9) 181 F. (2d) 505, 506). Nor is the intimation justifiable that appellant thereby obtained insurance which otherwise might have been denied him. Such



extraneous matters would constitute little support for finding, in the face of the direct evidence to the contrary, that appellant signed the license application (T. 30) with full knowledge of its contents. In fact, it appears that the trial Court made no such finding, but believed that carelessly executing such a document without reading it was sufficient to constitute the offense charged. If the trial Court based its judgment on this erroneous legal premise, the end result is the same as though the error had occurred in a charge to a jury. In either case an erroneous legal standard has been applied in determining the guilt or innocence of the accused. We submit, therefore, that the conviction on this count was erroneous as a matter of law and should be reversed.

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## II.

### THE SECOND COUNT.

**(a) The Statement Charged Is Not Within the Purview of 18 U.S.C. Section 1001.**

Appellee argues that wholly apart from 8 USC Section 1357 and the regulations cited in our opening brief (8 CFR Sections 242.11 and 242.12) immigration officers have a broader area of authority by virtue of 8 USC Section 1225 (a).

Appellee's argument proceeds upon erroneous premises. In the first place, the authority set forth in Section 1225 (a), *supra*, is expressed in language identical with Section 1357 (b). We quote the relevant portions of Section 1357:

“(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;”

\* \* \* \* \*

“(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code.”

Moreover, it is provided elsewhere in the statute (8 USC Section 1103) that “the Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens,” that “he shall have control, direction and supervision of all employees \* \* \* of the Service” and that “he shall establish such regulations \* \* \* as he deems necessary for

carrying out his authority under the provisions of this Act.”

It is settled that regulations of the Department issued pursuant to the authority of the statute have the force and effect of law and are binding upon the immigration officers as well as upon the alien (*U.S. ex rel. Ohm v. Perkins* (CA2) 79 F. 2d 533, 534).

It is of the utmost significance that the statute in conferring the power to interrogate and administer oaths and take and consider evidence, specifically provides that “any person to whom such oath has been administered” who shall “give false evidence or swear to any false statement” shall be guilty of perjury and punishable for that offense (Section 1357(b), *supra*). Thus both the statute and the regulations appear clearly to contemplate something in the nature of formal interrogation and seem clearly to negative the proposition that informal conversations may be used as a basis for prosecuting an individual through the invocation of a separate “false statement” statute (such as 18 USC 1001).

“Those charged with the enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment, to set aside any one of the rules on which the rights of aliens depend.”

*Sibray v. U.S. ex rel. Plichta* (CA3) 282 F. 795, 797-798.

It is impliedly conceded in appellee’s brief that the purpose of Anderson’s inquiry was concerned with the possibility of appellant’s being subject to deporta-

tion. Indeed the interrogation could have no other purpose, since appellant was within the United States and was not seeking to enter, re-enter or pass through the United States, nor was he making any other type of application. The interrogation was plainly of a nature which Sections 242.11 and 242.12 of the regulations were designed to cover, since those sections expressly apply to investigations having for their purpose the discovery of whether or not a basis for the institution of deportation proceedings may exist.

If the interrogation was designed to elicit information as to whether the applicant might possibly be subject to a deportation proceeding, then any information thus obtained could not be used without compliance with the regulations (*Bridges v. Wixon*, 326 U.S. 135, 65 S. Ct. 1443, 89 L.Ed. 2103). If, on the other hand, this was not the purpose of Anderson's interrogation, it is impossible to see why the interrogation took place, since its only purpose could be to explore the possibility that the appellant was not entitled to "reside in" the United States, i.e. that he was subject to deportation.

It is clear that the statute and the regulations create a unified pattern of procedure in connection with the investigation and determination of matters arising under the Act. Careful provision is made to separate the investigative function from the function of decision. Careful provision has also been made in the regulations which we have cited to prescribe proper procedure for the taking of statements by investigative personnel for use by the Service.



That Anderson was not proceeding in accordance with the authority to "administer oaths and to take and consider evidence" is clear from the facts that he did not administer any oath, did not take or record any evidence and that any statement made to him under the circumstances could not have been considered as evidence in any subsequent proceeding to determine the appellant's rights or privileges (8 CFR 242.11; *Bridges v. Wixon*, supra.). That Anderson was not taking "evidence" at that time is also clear from the fact that, although he had in his possession the file covering the entry of one CHOW BING KEW as an alien in 1929 and the information which he had was to the effect that this file pertained to the entry of the appellant, he made no effort to resolve the issue by interrogating appellant as to whether he was the person who had arrived at that time.

The case of *United States v. Meyers*, 131 F.S. 525, cited by appellee, is not in point. That case involved execution by a Federal employee in his official capacity of a false declaration regarding a matter pertaining to his official duties.

Appellee attempts to distinguish the cases of *United States v. Levin*, 133 F.S. 88, and *United States v. Stark, et al.*, 131 F.S. 190, on the ground that those cases involved statements made to a "strictly investigative agency" which has no power of final disposition of the matters being investigated. Obviously, this is a distinction without a difference. Here the interrogation was in the nature of a casual, "exploratory search" on the part of an investigator

under circumstances whereby any information thus obtained could not have been considered in any proceeding by the agency to determine any issue within its jurisdiction. The contention that the Service "has authority to finally dispose of matters of citizenship or lack thereof" is meaningless. The Service has such authority only when such an issue is presented in a "matter" or proceeding within its jurisdiction, and arises in the course of an authorized procedure to determine that issue.

The reasonable interpretation of 18 USC Section 1001, is that it covers only statements made in some proceeding which is within the jurisdiction of the agency to decide, and which may have some bearing upon its decision. Certainly a statement which cannot be used or considered by the agency in its proceedings to determine the issue is not within the reasonable interpretation of Section 1001, *supra*.

The proper construction of a criminal statute in circumstances such as those here presented is illustrated by the decision of the Supreme Court in *Todd, et al., v. United States*, 158 U.S. 278, 15 S.Ct. 889. In that case the statute (R.S. Section 5406) punished any person who might injure a witness for having testified "to any matter pending" in a Court of the United States. It was held by the Supreme Court that injuring a witness who had testified in a preliminary examination before a Commissioner was not within the purview of the statute. In that case the Court said:

“While a preliminary examination may be, in the strictest sense of the term, a judicial proceeding, yet the language of the statute is not broad enough to include every judicial proceeding held under the laws of the United States.”

The Court in that case also said:

“It is axiomatic that statutes creating and defining crimes cannot be extended by intendment and that no act, however wrongful, can be punished under such a statute, unless clearly within its terms. ‘There can be no constructive offenses and, before a man can be punished, his case must be plainly and unmistakably within the statute’ (citing authorities).”

In that case the Supreme Court cited with approval the earlier case of *United States v. Clark*, 1 Gall. 497, Fed. Cas. No. 14804, in which the indictment was for perjury on a preliminary examination before a Judge of the United States District Court under a statute which punished perjury “in any suit, controversy, matter or cause depending in any of the courts of the United States.” In the *Clark* case, the Court said

“The statute does not punish every perjury but only a perjury done in a Court of the United States. Primarily, therefore, it is of the essence of the offense that it should be charged as committed in such court.”

The conclusion was that perjury before a judge on a preliminary examination was not perjury in a

court of the United States within the meaning of those words in the criminal statute then under consideration.

We submit that in the case at bar a statement made in the course of a preliminary exploratory conversation with an investigator, which is not taken in accordance with the procedure prescribed to permit its use before the agency in subsequent proceedings is far from being "plainly and unmistakably within" 18 USC Section 1001, and is not one made *in* a "matter within the jurisdiction of" the agency within the meaning of that Section.

We would also point out that the wisdom and importance of the regulations covering the taking of statements in preliminary investigations regarding the right of an alien to be in the United States is well exemplified by the fact that when the investigator complied with the regulations in the case at bar, the result was a full disclosure by appellant which contained no untruth. It seems superfluous to point out that the regulations are designed not only to impress the person under interrogation that what he is about to say may become evidence in a subsequent proceeding, but to insure that there is no room for mistake or misapprehension either as to what is said or as to its importance. Here when the prescribed procedure was followed it immediately elicited the truth.

We have heretofore pointed out that the cases of *Cohen v. United States* (CA9) 201 F. 2d 386 and *Knowles v. United States* (CA10) 224 F. 2d 168,



upon which appellee relies, are clearly distinguishable, since those cases involved the formal submission of financial statements in a proceeding to determine the tax liability of the individual. The only cases arising under Section 1001, *supra*, which appear to have involved situations somewhat similar to that in the case at bar are the cases of *United States v. Levin*, *supra*, *United States v. Stark, et al.*, *supra*, and *United States v. Moore* (CA5) 185 F. 2d 92, all of which decisions hold that statements made in preliminary exploratory interviews of the nature here under discussion are not within the scope of Section 1001.

**(b) The Sufficiency of the Indictment.**

We have pointed out that the indictment alleges no more than that the statement was made to Anderson who was an investigator of the named agency and does not allege that it was made in a matter within the jurisdiction of that agency, nor that Anderson was acting in such a matter when it was made. The cases cited by appellee merely hold that if the indictment charges "all the essential elements" of the crime, defects in matters of form are to be disregarded. We have no quarrel with that well-settled principle. Our objection to the indictment goes not to a matter of form but a matter of substance, *viz.*: the omission to charge one of the essential elements of the offense. The cases cited in our opening brief hold that the omission from an indictment of a fact that constitutes an essential element of the crime intended to be charged is fatal. We submit that there was such a fatal omission in this instance in the failure to charge

that the statement was made in a matter within the jurisdiction of the agency, or at least that Anderson was acting in such a matter when the statement was made to him.

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### III.

#### CONCLUSION.

We submit as to Count One of the indictment that the court applied an erroneous rule of law in deciding the issue of wilful violation and that as to Count Two, neither the facts shown nor the facts pleaded constitute an offense within the purview of 18 USC Section 1001. We submit therefore that the judgment of the court below should be reversed.

Dated, February 15, 1957.

Respectfully submitted,

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No. 15,251

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CHOW BING KEW,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S PETITION FOR A REHEARING.

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IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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CHOW BING KEW,

VS.

UNITED STATES OF AMERICA,

*Appellant,*

*Appellee.*

**APPELLANT'S PETITION FOR A REHEARING.**

---

*To the Honorable Chief Judge William Denman,  
Judge Homer T. Bone, and Judge James Alger  
Fee, Judges of the United States Court of Appeals  
for the Ninth Circuit:*

Appellant, Chow Bing Kew, respectfully petitions for a rehearing in the above cause, on the ground that the decision of this Court entered on May 20, 1957 is erroneous in the following respects, to wit:

(1) In concluding that the trial court had not rested its judgment upon the proposition that carelessness was synonymous with guilt;

(2) In regarding evidence of other alleged misrepresentations as tending to prove that appellant made the misrepresentation charged in the indictment.

## I.

### THE TRIAL COURT BASED ITS JUDGMENT UPON THE ERRONEOUS PROPOSITION THAT CARELESSNESS WOULD JUSTIFY CONVICTION.

This Court quotes certain language in the "Judgment and Commitment," filed June 26, 1956 (T. 20-22), as indicating that the trial court made a finding that appellant had wilfully (i.e. consciously) made the representation referred to in the indictment. But a month previously, on May 28, 1956, the trial court had filed a formal "Judgment" (T. 14-15) which reads as follows:

#### "Judgment

"In accordance with the findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal filed herein, it is the judgment of the court that the defendant is guilty as charged in counts one and two of the indictment.

"Further, it is ordered that the defendant be referred to the Probation Office for a presentence report, and the time of sentence is tentatively set for June 26, 1956, at 2 p.m. in the United States Courthouse in Sacramento, California."

This Judgment, filed on May 28, was the determination and adjudication of guilt, and the subsequent



“Judgment and Commitment” consisted of the pronouncing of sentence plus a mere *recital* of what had *previously* taken place (determination of guilt and imposition of sentence being separate steps in the proceeding—Cf. *Pollard v. United States*, 77 S. Ct. 481, 484, 352 U.S. 360, 1 L. Ed. 393, 397).

The “Judgment and Commitment” filed on June 26, 1956 is in the form suggested in the specimen forms promulgated with the Federal Rules of Criminal Procedure and contains the recitals prescribed in those rules. But, as this Court has said in *Sanders v. Johnston*, 165 F. 2d 736 (cert. den. 68 S. Ct. 1328, 334 U.S. 829, 92 L. Ed. 1757, rehearing denied 69 S. Ct. 7, 335 U.S. 838, 93 L. Ed. 390):

“Rule 32(b) prescribes a recital in the judgment of the several steps taken by the court during the progress of a case from the entry of a plea to the pronouncement of sentence. Such a recital in the judgment would be *prima facie* evidence that the steps set forth therein actually took place, but it does not follow that a failure to make such a recital in the written judgment nullifies steps which did in fact occur.”

Conversely, in the case at bar the mere recital in the June 26 “Judgment and Commitment” of the several steps which had *theretofore* been taken in the case, could not nullify the fact that the adjudication of guilt *which the court had already made* and filed on May 28th *was expressly based on the findings of fact and conclusions of law contained in the ruling of the same date (T. 5-14) on the motions for judgment of ac-*

*quittal*, and those findings and conclusions on the issue of wilfulness simply stated that appellant "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (T. 8).

We see no escape from the conclusion that the trial court based its judgment of guilt upon this finding of fact and conclusion of law which says in effect that if appellant's claimed ignorance of the contents of the application was due to carelessness, such ignorance would constitute no defense. If this be what the trial court found, then obviously an error of law was made in determining the issue of wilfulness, and such error is in no wise rectified by later recital of the adjudication having been made, even though such later recital happens to be couched in the language of the indictment.

It is strikingly evident that on the question whether the trial court, in determining guilt, applied the erroneous theory that carelessness would warrant conviction, the record, to say the very least, is equivocal. We submit that a conviction of crime should not be permitted to rest upon so equivocal a foundation. This is particularly so when the uncontradicted evidence itself is strongly to the effect that the particular document involved was signed unread, through carelessness rather than design. From the record, it is extremely questionable that the Court found that appellant made the representation charged; on the contrary, the record strongly indicates that the trial court acted under the

erroneous belief that carelessness would be synonymous with guilt.

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## II.

### THE OTHER ALLEGED MISREPRESENTATIONS IN NO WISE TENDED TO ESTABLISH THAT APPLICANT WAS GUILTY OF THE OFFENSE CHARGED.

The opinion of this Court has disposed of all arguments raised by the United States and has concluded that the judgment of the Court below is sustainable only upon one ground, i.e., that evidence of other misrepresentations by appellant could be considered to negate the defense that he had signed the document referred to in the indictment without reading it and in ignorance of the fact that it contained a representation as to citizenship.

We respectfully submit that as a matter of law the conviction is not sustainable on that ground.

While evidence of other acts may be considered to prove intent or knowledge where the criminal act itself is admitted, or has otherwise been proved, such evidence is never competent to prove the doing of the act itself.

*Here the criminal act charged is not the mere signing of a paper; it is the making of a representation as to citizenship.* If appellant signed the paper unread, then he did not make the representation. If the making of the representation were conceded or proved, then evidence of similar acts could be considered to establish knowledge of its falsity, or lack of innocent intent.

Here, however, the making of the representation itself is denied and that denial is supported by all the testimony relative to the document in question. We submit therefore that the making of the representation cannot be established by evidence that appellant made other representations on other occasions. As stated by Wigmore:

“It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed to be done*—either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent.”

*Wigmore on Evidence* (3d Ed.), Vol. 2, Sec. 302, p. 200.

“Throughout the preceding topics it has been seen that under the Intent theory, the purpose was to negative innocent intent; if the Jury find the act proved, they are to use the evidence in question to determine the Intent.”

*Id.* Sec. 348 p. 251.

“In proving Intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.”

*Id.* Sec. 300 p. 193.

Another exception to the rule excluding evidence of similar acts relates to the use of such evidence to prove Knowledge. However, in that instance, the only knowledge which such evidence would be competent to prove



would be knowledge of the falsity of the representation *if consciously made*—not knowledge that the particular statement was contained in the document which the appellant signed. With regard to the use of such evidence as bearing upon the issue of Knowledge, Wigmore has this to say:

“Such, then, is the strict and legitimate scope of evidence of other similar acts to show Knowledge. The process of thought is: The other act will probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question.”

*Id.* Sec. 301 p. 194.

There is a third exception to the rule excluding evidence of other acts which has to do with the use of such evidence to prove a design or plan. No such situation is here presented because of the wholly disconnected character of the acts under discussion (see *Wigmore* Section 300 at p. 193). However, in discussing the application of the three exceptions to the rule excluding such evidence, with respect to a false representation case, Wigmore has the following comment:

“In a false representation or pretence, there is involved—alike in all the varieties of offense and in most civil cases as well as in criminal cases—the general notion of Intent to deceive. Within this, and usually decisive in showing it (but capable, as already noted, of being evidenced by a separate principle) is the element of Knowledge. Lastly, in the (here unusual) case *where the act of making the representation is disputed*, and resort is had to a system or design to prove it, the

stricter test applicable to proving Design may be invoked."

*Id.* Sec. 321 pp. 219-226.

As stated in 10 Ruling Case Law at p. 939:

"It is not competent to prove that he committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the indictment."

\* \* \*

"A man may have committed many crimes and still be innocent of the crime charged in the case on trial."

We submit that in this case evidence of other representations by appellant could not tend to prove in the face of all the evidence to the contrary that he signed the application here in question knowing that it contained the representation of citizenship. Had it been established that the making of such a representation was a volitional act on his part, then evidence of other such acts might bear upon the issues of innocent intent or knowledge of falsity. Such evidence can have no effect in proof of the making of the representation itself. This is particularly so when it is borne in mind that the document itself was prepared by an employee of the Board of Equalization; that appellant had nothing to do with its preparation; that the license being applied for was for a partnership (T. 100); that the concern held a sales permit issued by the Board of Equalization which showed the names of the partners (T. 155), some of whom are citizens (T. 154-155), and in fact, the application itself (T. 30) contained a refer-

ence to this seller's permit No. C-64064. It was well-known to all concerned that this application was for a license for the "Daylite Market" and not for appellant personally, and we submit that there is in the record no substantial support whatever for a finding that appellant knowingly and wilfully represented to the State Board of Equalization that he was a citizen of the United States in connection with this application, as to which citizenship of the person executing the application or indeed of the concern itself is entirely immaterial under the law except where "on-sale" license is being sought (California Business and Professions Code, Sec. 23788).

In its opinion of May 20, 1957 this Court has held that the element of wilfulness requires proof beyond a reasonable doubt "that the misrepresentation was voluntarily and deliberately made," and that the mere signed document did not itself prove that element. The Court concluded, however, that because appellant had admittedly signed the document, evidence of other misrepresentations could prove that he voluntarily and deliberately made the representation of citizenship which had been typed in the body of the document. But the prosecution cannot establish the making of this representation by proof that he made other representations; the most that can be said is that *had it been shown* by other evidence that appellant had either furnished the data contained in the document or been aware of the presence of the representation in the document when he signed it, then evidence of similar representations by him might tend to show that the

representation so made was not made innocently, in good faith, or without knowledge of its falsity.

It is indisputable that appellant did not prepare the document, that he did not participate in its preparation, that he was not present when it was prepared and that he did not furnish the information contained in it. Unless he read the document when Helton placed it in front of him for signature then he neither made the representation as to citizenship contained therein nor adopted it. The narrow issue, therefore, was whether he had read it. Certainly proof of other acts at other times could not tend in any way to prove the reading of the document by him on this occasion. The case is very similar in this respect to

*United States v. Gulotta*, 29 F. S. 947,  
wherein the Court dismissed one charge based on defendant having signed an entry in a voting register (there being no evidence that he had personally furnished the data shown in the entry), even though a similar representation at another time was proved.

---

### CONCLUSION.

Upon this entire record there is the gravest doubt whether anything more than carelessness was involved, and whether the trial Court did not erroneously conclude that mere carelessness would justify conviction. Upon such a doubtful and equivocal state of the record, we submit, the conviction should not be permitted to rest upon the dubious foundation of proof of other acts for which appellant is not now being prosecuted.



“It is universally held that in cases based upon circumstantial evidence, a verdict of guilty may be rendered by the trier of the facts only when the evidence may be said to exclude every reasonable hypothesis except that of guilt and to be inconsistent with every hypothesis of innocence (citing cases).”

*Maenza v. United States* (CA 5), 242 F (2d) 339, 441.

“\* \* \* and this Court has frequently held that evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction; and that where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction.”

*Ezzard v. United States* (CA 8), 7 F (2d) 808, 812.

It is respectfully submitted that a rehearing should be granted.

Dated, San Francisco, California,

June 5, 1957.

FORREST E. MACOMBER,  
KENNETH G. MCGILVRAY,  
ARTHUR J. PHELAN,  
*Attorneys for Appellant  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for Chow Bing Kew, appellant and petitioner in the above cause and that in our judgment the foregoing Petition for a Rehearing is well founded in point of law as well as in fact and that said Petition for a Rehearing is not interposed for delay.

Dated, San Francisco, California,  
June 5, 1957.

FORREST E. MACOMBER,  
KENNETH G. MCGILVRAY,  
ARTHUR J. PHELAN,  
*Attorneys for Appellant  
and Petitioner.*

No. 15267

---

United States  
Court of Appeals  
for the Ninth Circuit

---

PERCY HOOD and GRACE HOOD, His Wife,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.

FILED

NOV 1918

PAUL P. O'BRIEN, CLERK





No. 15267

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**United States  
Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Western District of  
Washington, Northern Division

Federal Court No. 121

(Superior Court No. 33445)

FRANK X. IMHOF, LYLE HUNTER and  
LORETTA HUNTER, His Wife; RUTH  
SLATER, a Widow; EVERETT MATZ and  
NINA MATZ, His Wife; MYRTLE BLOX-  
HAM, ARTHUR B. WATTS and MAR-  
GARET M. WATTS, His Wife, and PERCY  
HOOD and GRACE HOOD, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### PETITION FOR REMOVAL

Petition for Removal of the above-entitled cause  
to the United States District Court for the Western  
District of Washington, Northern Division at Bell-  
ingham, from the Superior Court of the State of  
Washington for Whatcom County.

Comes now the petitioner, United States of  
America, through its undersigned attorneys, which  
petitioner is named as defendant in the above-en-  
titled cause and shows:

#### I.

A civil action has been commenced and is now  
pending in the Superior Court of the State of  
Washington for Whatcom County, wherein the

United States of America is defendant, which action is designated as No. 33445.

## II.

Said Action No. 33445 is a civil action in which the United States District Court has jurisdiction in that said suit is to quiet title to certain lands and lift certain liens thereon under the provisions of Title 28, U.S.C., Sections 2410 and 1444.

## III.

Petitioner seeks removal of said Action No. 33445 from the State Court to the Federal Court upon the ground of specific statutory authorization for removal under Title 28, Section 1446, U.S.C. Said action was commenced by Summons served on the United States Attorney on June 10, 1953.

## IV.

Under the provisions of Title 28, U.S.C., Section 1446 (d), no bond is required of the United States of America.

## V.

Petitioner promptly after filing of this petition gives written notice of the filing of this petition as required by Section 1446(e), Title 28, U.S.C., a true copy of which notice of proof of service is filed herein.

Wherefore, petitioner prays that said Action No. 33445 in the Superior Court of the State of Washington for Whatcom County, be removed from said court into this court for trial and determination.



Dated this . . . . day of June, 1953.

/s/ J. CHARLES DENNIS,  
United States Attorney;

/s/ GEORGE E. HEIDLEHAUGH,  
Special Assistant to the  
United States Attorney.

Duly verified.

In the Superior Court of the State of  
Washington for Whatcom County

No. 33445

FRANK X. IMHOF, LYLE HUNTER and  
LORETTA HUNTER, His Wife; RUTH  
SLATER, a Widow; EVERETT MATZ and  
NINA MATZ, His Wife; MYRTLE BLOX-  
HAM, ARTHUR B. WATTS and MAR-  
GARET M. WATTS, His Wife, and PERCY  
HOOD and GRACE HOOD, His Wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

### COMPLAINT

For Their Cause of Action, the Plaintiffs Allege:

#### I.

This action is brought to quiet the respective  
titles of the Plaintiffs against liens claimed thereon

by the United States. The lands are situated in the County of Whatcom, State of Washington, and are hereinafter more particularly described. The action is authorized by Section 2410, Title 28, United States Code.

## II.

That in said County and in the delta of the Nooksack River, the Defendant long prior to any date material to this Cause established the Lummi Indian Reservation, and in its capacity as guardian of and in trust for the members of the Lummi Tribe of Indians, did hold title to the lands within such Reservation, which included the lands involved in this Cause. Thereafter, and prior to the month of March, 1926, by process of allotment and patenting in severalty, and by sale and conveyance, certain tracts therein, among which are those now owned by the Plaintiffs (except the Plaintiffs Percy Hood and Grace Hood, his wife) became vested in private ownership in fee simple in the Plaintiffs, or in various persons from whom the Plaintiffs, or some of them, by mesne conveyances, have derived title. The said Plaintiffs, respectively, own the several tracts, each particularly described in Exhibit A-1 attached to and made a part hereof and are in possession thereof.

## III.

That on March 18, 1926, the Congress of the Defendant, the United States, enacted a statute, approved the same day, cited as 44 Stat. at Large, 211-212, entitled and reading as set forth in Exhibit B attached hereto and made a part hereof and in effect appropriating the sum of \$65,000.00 for the

reclaiming by construction of dikes of approximately 4,000 acres of land in Indian and "private ownership" within and immediately adjacent to the Lummi Indian Reservation aforesaid and providing that the total costs of the project should be distributed equitably among the lands in Indian ownership and those in private ownership which might be benefited thereby in accordance with the benefits to be ascertained and designated by the Secretary of the Interior, and providing that the charges assessable against "Indian lands" should be reimbursed to the Treasury of the United States under such rules and regulations as the said Secretary might prescribe, and creating a lien against such lands therefor, and providing that no part of the sum provided for construction could be expended on account of lands in private ownership until appropriate repayment contracts in form to be approved by the said Secretary should have been properly executed by the landowners whose lands might be benefited by the project and providing that the said Secretary might declare by public notice the cost of the project and the equitable share to be assessed against the benefited lands to be paid in annual installments of 5% of the principal each year and with interest at 4% per annum on the deferred portions thereof, and authorizing the Secretary to perform all needful acts and to make such rules and regulations as might be necessary whereby to carry the said Act into full force and effect.

#### IV.

That thereafter, and in preparation for the construction of such dike, the Defendant's then Sec-

retary of the Interior did purport to determine that certain lands, including those owned by the said Plaintiffs were lands in "private ownership" within the meaning of that statute and that the same would be benefited by the construction of such dike, and he did by his agents then solicit the then owners of said lands of the Plaintiffs to enter into contracts, severally, with him in behalf of the Defendant whereby each such owner would agree to pay the Defendant such pro rata share of the entire cost of such Lummi Diking Project, and all of the betterment, operation and maintenance charges and penalties in connection therewith in not less than twenty (20) annual installments beginning in December of the third year following the issuance of the "public" notice contemplated by said Act, and would further agree that their respective lands would be by such contracts at once burdened with a first lien in favor of the Defendant to secure the payment of such costs, and would further agree upon demand of the Secretary to convey such lands to the United States as security therefor, and whereby under such contracts such owners would also agree that should it become necessary to incur any additional expense for betterment, operation or maintenance of said diking system after the construction thereof on issuance of such public notice they, respectively, would pay their "proper proportionate share" of such costs in addition to those fixed by the public notice and in accordance with rules and regulations that might be issued by the said Secretary of the Interior; that a typical form of such a contract



marked Exhibit C is attached hereto and made a part hereof.

V.

That the said then owners of said lands did refuse to execute such contracts, and they and their successors in title have ever since refused so to do; that the said Secretary or his successors and/or agents did purport to ascertain and determine that the said lands would be benefited by such construction but that notwithstanding such facts, and notwithstanding the prohibition in Section 3 of said Statutes forbidding the expenditure of any part of said appropriation for construction on account of any lands in private ownership until such contracts should have been executed, said Secretary and his successors, and his and their agents, did thereafter construct such dikes; that as the Plaintiffs are informed and believe about the year 1930 the said Secretary or his successors and/or agents did purport to declare by "public notice" the respective equitable shares of the construction costs thereof which he or they deemed attributable to the respective tracts of land within and without said Lummi Indian Reservation which they determined were benefited by such construction; that such "public notice" has not been filed or recorded in the office of the Auditor of said Whatcom County, Washington, wherein by the law of said state instruments affecting title to lands in said county should be recorded, but Plaintiffs have been informed that said "public notice" has been compiled and executed and deposited in some office of the Department of the Interior of the Defendant at Washington, District of Columbia, but Plain-

tiffs have not been able to ascertain whether said "public notice," or a copy thereof, has been filed or deposited in any other place, nor have Plaintiffs been able to examine or learn the exact contents thereof but are informed and believe that the said "public notice" asserts and claims in behalf of the Defendant liens against said tracts of the Plaintiffs herein for such respective amounts and to the same extent as if the Plaintiffs or their respective predecessors in title at that time, had executed the lien contracts hereinbefore mentioned; that the amounts so claimed, against each such tract of the Plaintiffs as furnished by agents of the Defendant, and the respective sub-items thereof, as of the recent dates respectfully indicated, are set forth in Exhibit A-1 above mentioned.

## VI.

That thereafter the Defendant by its agents has continuously asserted and claimed the right to payment of said sums and existence of liens therefor on the respective lands of said Plaintiffs; that such assertions have become generally known in the community where said lands are located, and have diminished the value and/or the marketability of said lands and constitute clouds on the titles thereto; that in truth and in fact the Defendant has no lien or right thereto, or any other, right, title or interest in or to said lands, and that its claims are without any foundation and wholly void, and that its actions in respect to such claims are contrary to law, and in particular are in violation and excess of any authority granted by the Congress under said Act of March 18, 1926, and in any event violate the Constitution of the United States and

of the State of Washington in that such claims would deprive the Plaintiffs of property without due process of law.

## VII.

That thereafter at various times the said Secretary or his successors persuaded the Congress of the United States to appropriate various sums of money for the costs of repair and/or betterment of said dike and under statutes some thereof providing that such costs were to be "reimbursable" to the Defendant from the owners of the lands benefited and further providing that no such funds were to be expended for the benefit of lands in "private ownership" without arrangements for such reimbursement and providing that the finding of the existence of such benefits and the distribution of such costs to such tracts were to be made pursuant to such rules and regulations which the said Secretary or his successors might formulate and that such costs as so distributed should be liens against the respective tracts so found to be benefited. That the Defendant, by its said Secretary, his successors or agents, has purported to formulate such rules and to find that among others, the various tracts of the Plaintiffs hereinbefore mentioned, would be and have been so benefited, and threatens to distribute all such costs on lands, including those of the said Plaintiffs, and claims and asserts that the United States has rights to liens to secure the repayment of such additional costs; that the Plaintiffs or their respective predecessors in title have at no time agreed, in writing or otherwise, to the imposition of such charges,



and have had no opportunity whatsoever to be heard with respect to the necessity for, or the kind or nature of such betterments or repairs.

### VIII.

That the Plaintiffs, Percy Hood and Grace Hood, his wife, are the owners of a tract of land within the said Lummi Reservation, which is more particularly described in Exhibit A-2 attached hereto, and which tract is therein and hereinafter referred to as the "Ya-him-a-loo Tract." That in all respects other than the derivation and status of the title thereto, the matters and things hereinbefore pleaded refer to said tract. That the facts of said ownership are: That on December 31, 1884, the United States, then having legal title as Trustee as aforesaid, conveyed the said land by patent executed by its then President to Mary Yah-Him-A-Loo, which was recorded June 13, 1885, in Vol. 1, page 56, Records of Whatcom County, Washington, a copy of which, marked Exhibit D, is attached hereto and made a part hereof; that on November 10, 1925, title to said tract was in the legal heirs of said Mary Yah-Him-A-Loo (she having previously died) but their right to alienate the same was subject to the approval of the Secretary of the Interior of the Defendant; that on said date of November 10, 1925, said tract was sold to the said Plaintiffs, Percy Hood and Grace Hood, in the following manner: W. F. Dickens, agent of the Defendant and its Superintendent of the Tulalip Indian Agency, under whose administrative juris-



diction said land of the said heirs were, received a bid from said Hoods (pursuant to previous public invitation by him) and in conformity with the terms of said bids and his acceptance thereof, he entered with them into a "memorandum of sale" agreement, copy of which, marked Exhibit E, is attached hereto and made a part hereof. That said agreement provided for a total price of \$10,100.00, payable \$2,525.00 in cash and the remainder in four equal deferred successive annual payments, evidenced by separate promissory notes each in the amount of \$1,893.75, and each note bearing interest at 6% per annum, and further provided that if said notes were so paid according to their tenor then a Deed from said heirs, and approved by the said Secretary of the Interior, and which Deed was to be held in escrow by the Defendant's Commissioner of Indian Affairs, should be delivered to the said Hoods; that such a Deed, bearing even date therewith was so escrowed, and a copy thereof marked Exhibit F is attached hereto and made a part hereof; that said Plaintiffs did pay all of said notes, long before maturity of the latest to become due, and before April 30, 1928, whereupon said Deed was delivered to them and was recorded in Book 200, page 235, Records of said County; that possession of said real estate was given to the said Plaintiffs, Percy Hood and Grace Hood, his wife, on November 10, 1925, or in any event prior to the enactment of said Act of March 18, 1926; that said Deed was approved by John H. Edwards, Assistant Secretary of the Interior, acting in be-

half of the Secretary of the Interior, of the Defendant, on August 10, 1926; that the Defendant contends said tract was in "Indian ownership," and was not in "private ownership" within the meaning of the said Act of March 18, 1926, and that the same therefore became encumbered, under the provisions of Section 2 of said Act, with a lien in favor of construction charges apportionable thereto; that said Plaintiffs allege that under the facts and circumstances hereinbefore set forth, that equitable title did pass, and legal title to said tract should be deemed to have passed, to them as of November 10, 1925, or in any event that under such facts and circumstances the Defendant is estopped to claim the contrary; that in any event title in fee to said lands was vested in the said heirs of Mary Yah-Him-A-Loo at the time of such sale and that there was no power on the part of the Defendant, or its Congress, to impose any lien, and particularly the lien contemplated by said Act on lands so owned without the consent or by the contract of such owners; that none of the heirs of said Mary Yah-Him-A-Loo, that is to say none of the said owners, ever so consented or contracted, and that the claims of the Defendant to a lien for reimbursement of such costs as to said tract or any of the other tracts mentioned in this Complaint are without any foundation in law or in fact.

Wherefore, these Plaintiffs pray that they be adjudged and decreed to be the owners in fee simple of said lands and that their titles thereto

be, respectively, quieted against any lien, right, title or interest of the Defendant therein or thereto and that the liens and claims of the Defendant arising out of said Act of March 18, 1926, and any other Acts of Congress supplemental thereto, and related to the construction, operation, maintenance, betterment and/or improvement of any dikes by the Defendant affecting said lands be adjudged to be null, void and of no effect; and that they have judgment for their costs and such other and further relief as may be proper.

/s/ DONALD M. BUSHNELL,

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ WM. S. EVENSON,

Attorneys for the Plaintiffs.

Duly verified.

## EXHIBIT A-1

## Statement of Ownership of Lands by Plaintiffs, Except Percy Hood and Grace Hood, Together With Statements of Diking Charges Claimed Thereon

(Following the name of each Plaintiff hereafter is the description of the tracts owned by each such Plaintiff or Plaintiffs referred to in Paragraph II of the Complaint and following the description a statement of the liens claimed thereon by the United States.

Frank X. Imhof (who is married to Patricia Imhof):

Lots 2 and 9, and the SW $\frac{1}{4}$  NE $\frac{1}{4}$  and the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 6, Twp. 38 N., R. 2 E.

Total construction assessments unpaid April 30, 1952 (19—\$63.37 installments due) .....	\$1,204.03	
Interest to April 30, 1952.....	1,045.22	
Total due for Construction.....		\$2,249.25
Total operation and maintenance assessments unpaid April 30, 1952.....	1,736.62	
Unpaid penalty charges computed to April 30, 1952.....	870.03	
Total due for operation & maintenance .....		2,606.65
Total operation-maintenance, and construction assessments due April 30, 1952, with interest and penalties to April 30, 1952.....		\$4,855.90

Lyle Hunter and Loretta Hunter, his wife, Gov't Lot 3, Sec. 1, Twp. 38 N., R. 1 E.

Total construction assessments unpaid April 30, 1953 (19—\$6,32 $\frac{1}{2}$ installments due) .....	\$ 120.17 $\frac{1}{2}$	
Interest to April 30, 1952.....	104.32 $\frac{1}{2}$	
Total due for construction.....		224.50
Total operation and maintenance assessments unpaid April 30, 1952.....	422.79 $\frac{1}{2}$	
Unpaid penalty charges computed to April 30, 1952.....	211.80 $\frac{1}{2}$	
Total due for operation & maintenance .....		634.60



Total operation-maintenance, and construction assessments due April 30, 1953, with interest and penalties to April 30, 1952.....	859.10
--	--------

Everett Matz and Nina Matz, his wife, Gov't Lot 2, Sec. 1, Twp. 38 N., R. 1 E.

Total construction assessments unpaid April 30, 1952 (19—\$6.32½ installments due) .....	\$ 120.17½
Interest to April 30, 1952.....	104.32½
Total due for construction.....	\$ 224.50

Total operation and maintenance assessments unpaid April 30, 1952.....	422.79½
Unpaid penalty charges computed to April 30, 1952.....	211.80½
Total due for operation & maintenance .....	634.60

Total operation-maintenance, and construction assessments due April 30, 1952, with interest and penalties to April 30, 1952.....	859.10
--	--------

Ruth Slater (Mrs. Glen Slater).

So much of Lots 3, 4 and 6, and the SW¼ NW¼ Sec. 2, Twp. 38 N., R. 1 E. as are within the boundaries of the Lummi Diking District.

Total construction assessments unpaid April 30, 1952 (17—\$35.74 installments due) .....	607.58
Unpaid interest to April 30, 1952.....	479.96
Total due for construction.....	1,087.54

Total operation and maintenance assessments unpaid April 30, 1952.....	771.63
Unpaid penalty charges computed to April 30, 1952.....	287.02
Total due for operation & maintenance .....	1,058.65

Total operation-maintenance, and construction assessments due April 30, 1952, with interest and penalties to April 30, 1952.....	\$2,146.19
--	------------

Myrtle Bloxham

NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and Lot 13, Sec. 7, T. 38 N., R. 2 E. W. M., except a triangular parcel of land in the southwest corner of said Gov't Lot 13, lying southwest of Smuggler Slough; also a triangular parcel of land in Lot 8, south of said Lot 13, between Smuggler Slough and Slater Slough.

Total operation and maintenance assessments unpaid March 31, 1952.....	\$ 535.04
Unpaid penalty charges computed to March 31, 1952.....	706.25

Total due for operation and maintenance .....	\$1,241.29
---	------------

Total assessments (construction) unpaid March 31, 1952 (19—\$39.14 installments due) .....	743.66
Interest of 4% on \$743.66 from date of Public Notice, August 19, 1930, to March 31, 1952 .....	643.06

Total due for construction.....	1,386.72
---------------------------------	----------

Total operation-maintenance, and construction assessments due March 31, 1952, with interest and penalties to March 31, 1952.....	\$2,628.01
--	------------

Arthur B. Watts and Margaret M. Watts, his wife, NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  Gov't Lot 4 in Section 1, T. 38 N., R. 1 East of W. M. less roads.

The amounts claimed against this Tract are not definitely known to Plaintiffs, though request therefor from the Bureau of Indian Affairs has been long since made. When obtained, Plaintiffs will ask leave to insert the same.

## EXHIBIT A-2

Land of Percy Hood and Grace Hood

Indian Deed to Percy Hood.

Lots 5, 6 and 7, Section 6, Township 38 North of Range 2 E. W.M. containing 79.82 acres more or less.

## EXHIBIT B

Act of March 18, 1926, 44 Stat. 211-12

“An Act for the purpose of reclaiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes.”

Sec. 1. That there is hereby authorized to be appropriated the sum of \$65,000 or so much thereof as may be required, for reclaiming by construction of dikes approximately four thousand acres of lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington: Provided, that the total cost of the project shall be distributed equitably among the lands in Indian ownership and the lands in private ownership that may be benefited in accordance with the benefits received as designated by the Secretary of the Interior.

Sec. 2. The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such lands.

Sec. 3. No part of the sum provided for herein shall be expended for construction on account of

any lands in private ownership until an appropriate repayment contract in accordance with the terms of this Act and in form approved by the Secretary of the Interior shall have been properly executed by the landowners whose lands may be benefited by the project.

Sec. 4. The Secretary of the Interior is hereby authorized and directed to declare by public notice the cost of the project and the equitable share to be assessed against the lands, benefited in accordance with their respective benefits, which cost shall be repaid in annual installments, the first installment to be 5 per centum of the total charge and be due and payable on the 1st day of December of the third year following the date of such public notice, the remainder of the said cost with interest on deferred amounts against land in private ownership from the date of said public notice to be 4 per centum per annum to be payable on each December 1 thereafter, on the same basis as the first installment, until the obligation is paid in full.

Sec. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.



## EXHIBIT C

Landowners' Agreement With the Secretary of the Interior—Lummi Project—Act of March 18, 1926.

Whereas an Act of Congress approved March 18, 1926, entitled "An Act for the purpose of reclaiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes."

(Here is inserted the text of the Act of March 18, 1926, as set forth in full in Exhibit B.)

And, Whereas, Section 3 of the Act provides that no part of the sum provided for therein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of the Act and in form approved by such landowners whose lands may be benefited by the project.

And, Whereas, the undersigned declares that he is the owner of approximately ..... acres of land adjacent to the Lummi Indian Reservation, which will benefit by the construction of the project authorized by said Act, which he wishes to have included within the project for the purpose of benefiting such lands under the conditions hereinafter stated.

Now, therefore, and in order to aid in the accomplishment of the purposes of the Act, the said

undersigned owner of the lands aforesaid covenants, promises, and agrees to and with the Secretary of the Interior and with all other landowners whose lands may be included within the project, in consideration of the premises, the premises of said other landowners, and the work to be done by the United States in connection with the project, that if the Secretary of the Interior shall construct dikes for the purpose contemplated in the Act said lands shall at once be and become burdened with and subject to a first lien, so far as this agreement can make the same a first lien, to secure to the United States the full payment of a pro rata share of the entire costs of said project and all of the betterment, operation, and maintenance charges, and penalties in connection therewith; and the undersigned further hereby agrees that, if and when notified to do so by the Secretary of the Interior or his duly authorized agent or agents, he will promptly further convey or cause to be conveyed to the United States by good and sufficient deeds or other instruments satisfactory to the Secretary of the Interior, for use upon and in connection with said project to assure the repayment of the pro rata share of the entire cost of the project properly apportionable to said lands, which lands are described as follows:

Lot 5 NW Sec. 6, T. 38 N., R. 2 E. W.M.

Lot 6 NW Sec. 6, T. 38 N., R. 2 E. W.M.

Lot 7 SW Sec. 6, T. 38 N., R. 2 E. W.M.

Class 2 of Dyking construction charges 20.00  
acres.

Class 3 of Dyking construction charges 49.82 acres.

The undersigned further covenants and agrees that after the completion of the project and the issuance of public notice by the said Secretary of the Interior as provided for in Section 4 of the Act he shall promptly make payment of the first installment amounting to five (5) per centum of the total charge on the 1st of December of the third year following the date of the issuance of public notice, and that he shall pay each succeeding installment on each December 1st thereafter until the total indebtedness shall have been paid; that said undersigned shall have the right to pay on the due date of the first installment the total assessment against his lands; otherwise he shall pay an interest charge on all installments except the first, at the rate of four (4) per centum per annum which shall be computed from the date of the issuance of said public notice. The undersigned may at any time, however, prior to the due dates pay the total of the then unpaid indebtedness.

The undersigned further agrees to furnish the Secretary of the Interior or his agents, within 30 days from demand by any such agent, proper abstracts of title covering his said lands; and failing so to do hereby authorizes him or his agents to obtain same at said owner's expense. Said abstracts after examination shall be returned to their owners.

The undersigned further agrees and promises, should it be necessary to incur any additional ex-

pense for betterment, operation or maintenance of the said diking system after the project shall have been constructed and public notice issued therefor, to pay his proper proportionate share of such betterment, operation and maintenance costs, which amounts shall be paid in addition to the sum fixed by the public notice and shall be paid in accordance with rules and regulations that may be issued by said Secretary of the Interior.

It is understood and agreed that the work shall be undertaken and completed as rapidly as conditions warrant after contract shall have been obtained from the owners of the private lands coming within the project.

After payment shall have been made by the undersigned of the total obligation assessable against his lands, the said Secretary of the Interior shall issue a relinquishment of the lien herein created against said lands. Such relinquishment, however, shall not be construed as relieving the landowner from paying his proportionate share of any betterment, maintenance and operation costs that may accrue from time to time in operating and maintaining the project.

This agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, and assigns of the parties hereto.

In Witness Whereof the undersigned ha... hereunto set . . . . . hand and seal this . . . . day of . . . . , 192 . .



State of Washington,  
County of .....—ss.

This instrument was acknowledged before me  
this .... day of ....., 192., by the above-  
named ..... and ....., his wife.

In Witness Whereof I have hereunto set my  
hand and seal of office.

.....,  
Notary Public.

## EXHIBIT D

No. 283, United States to Yah Him Aloo or Mary,  
Patent.

(4-457 a.)

The United States of America. To all to whom  
these presents shall come, Greeting:

Whereas, by the seventh article of the treaty con-  
cluded on the twenty-second day of January Anno  
Domini one thousand eight hundred and fifty-five,  
between Isaac I. Stevens, governor, and superin-  
tendent of Indian Affairs of Washington Territory,  
on the part of the United States and the chiefs,  
headmen, and delegates of the Dwamish, Suqua-  
mish, Sktahlmish, Samahmish, Smalhkahmish,  
Skopeahmish, Stkahmish, Snoqualmoo, Skainham-  
ish, N'Quentlmamish, Sktahlejum, Stoluckwhamish,

Snohomish, Skagit, Kikiallus, Swinamish, Squinamish, Salikumehu, Noowhaha, Nookwachalunish, Muscequaguilch, Chobahabbish, and other allied and subordinate tribes and lands of Indians, it is provided that the President, "at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable." And, Whereas, there has been deposited in the General Land Office of the United States an order bearing date October 16, 1884, from the Acting Secretary of the Interior, accompanied by a Return dated from the Office of Indian Affairs, with a list approved October 14, 1884, by the President of the United States, showing the names of members of the Lummi band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which list the following tracts of land have been designated as the selection of Yah him aloo or Mary, viz.: Lots numbered five, six and seven of section six in township thirty-eight North of range two East of the Willamette Meridian, Washington Territory, containing Seventy-nine acres and eighty-two hundredths of an acre. Now know Ye that the United

State of America in consideration of the promises and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted and by these presents does give and grant unto the said Yah him aloo or Mary and to her heirs the tracts of land above described but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts "shall not be aliened or leased for a longer term than two years; and shall be exempt from levy sale or foreiture, which conditions shall continue in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions" and "no State Legislature shall remove the restrictions without the consent of Congress." To have and to hold the said tracts of land with the appurtenances unto the said Yah him aloo or Mary and to heir heirs forever, with the stipulation aforesaid. In Testimony whereof I, Chester A. Arthur, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed. Given under my hand at the City of Washington this thirty-first day of December in the year of our Lord one thousand eight hundred and eight-four and of the Independence of the United States the one hundred and ninth.

By the President:

CHESTER A. ARTHUR.

By M. McKEAN,  
Secretary.

S. W. CLARK,  
Recorder of the General Land  
Office.

Received for record at 4:00 p.m. June 13, A.D. 1885, and recorded at the request of Yah him aloo or Mary.

C. DONOVAN,  
County Auditor of Whatcom County, Washington  
Territory.

[Seal of U. S. General Land Office]: Recorded,  
Vol 1, pg. 56.

## EXHIBIT E

5-110

### Memorandum of Sale of Allotted Land (When Conveyance Is by Deed)

The undersigned Percy Hood and Grace H. Hood, his wife, having on November 10, 1925, purchased Lots 5, 6 and 7 of Sec. 6, Twp. 38 N., Range 2 E., W.M., containing 79.82 acres more or less allotment No. Lummi 22 of Lummi Indian Reservation, Washington, for \$10,100.00, and having made a payment of \$2,525.00 being 25 per cent thereof, and agreed to pay the balance thereof, being \$7,575.00



in deferred payments as evidenced by four promissory notes of even date herewith for \$1,893.75 each, numbered from one to four payable to the Superintendent or other officer in charge of the Tulalip Indian Reservation, on or before 1, 2, 3 and 4 years after date, with interest at the rate of six per cent per annum, payable annually from the date of approval of this memorandum by the Secretary of the Interior;

Now This Memorandum Witnesseth: That upon the payment in full by said Percy Hood and Grace H. Hood, his wife, of said sum of \$7,575.00 being the balance of said consideration of \$10,100.00, with interest thereon, according to the tenor and effect of said notes, then and in such case a deed duly executed by said heirs of Mary Yah him a loo, and approved by the Secretary of the Interior, shall be delivered to said Percy Hood and Grace H. Hood, his wife, conveying said land to them and their heirs pursuant to law.

And said Percy Hood and Grace H. Hood, his wife, agree that upon default by them in the payment of said notes or either of them or the interest thereon, the sale of said land to Percy Hood and Grace H. Hood, his wife, may, at the option of the Secretary of the Interior, be cancelled and said land readvertised for sale, and in such case the sum of \$2,525.00, being 25 per cent of the amount agreed to be paid by said Percy Hood and Grace H. Hood, his wife, shall be forfeited as provided by law for the use of heirs of Mary Yah him aloo,

vendors, and any balance remaining of the amount paid by said Percy Hood and Grace H. Hood, his wife, after deducting said 25 per cent forfeiture, shall, in case the same is not repaid to Percy Hood and Grace H. Hood, his wife, by the vendors, be repaid to them out of the proceeds of such subsequent sale, or from such other sources as may be applicable in the discretion of the Secretary of the Interior;

It is further understood and agreed that the deed hereinbefore provided for shall be retained in escrow by the Commissioner of Indian Affairs until all the notes and interest before mentioned shall have been paid, when it shall be delivered to said Percy Hood and Grace H. Hood, his wife, as hereinbefore provided.

Signed at Ferndale, Washington, this 10th day of November, 1925.

/s/ W. F. DICKENS,  
Superintendent and  
Disbursing Agent;

/s/ PERCY HOOD;  
/s/ GRACE H. HOOD,  
Purchaser.

Stamp: Department of the Interior, Washington,  
D. C., Aug. 10, 1926.

Approved:

(6856)

/s/ JOHN H. EDWARDS,  
Assistant Secretary.

## EXHIBIT F

5-183

## Indian Deed Inherited Lands

This Indenture, Made and entered into this 10th day of November, 1925, by and between Mary George, Mary Ann Kittles, Cecelia Morris, Agnes G. Phair, Julia Ann Jefferson, Lucinda George, Joseph Jefferson, Henry Kwina, Sarah Descanum, John C. Brown, Maggie Youckton, Agnes Bob, Johanna Guerin Kelly, Alexis George, Augustine Youkton, Matilda Curley, Sarah Bob, Minnie Williams, Edna Bizer Hillaire, Daniel Price, Wilfred Price, Harry Price, and Joseph Hillaire and Walter F. Dickens, Legal Guardian of Elmer Brown, Mary Madeline Brown, Ethel Hillaire and Louis Hillaire, minors, of the State of Washington, heirs of Mary Yahimaloo, deceased, a Lummi Indian, Allottee No. L-22, parties of the first part, and Percy Hood of Ferndale, Washington, party of the second part:

Witnesseth, That said parties of the first part, for and in the consideration of the sum of Ten Thousand One Hundred & No/100 Dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part the following described real estate and premises situated in Whatcom County, State of Washington, to wit:

Lots Five (5), Six (6) and Seven (7), Section Six (6), Township Thirty-eight (38) North of Range 2 E. W.M., containing 79.82 acres more or

less, together with all the improvements thereon and the appurtenances thereunto belonging. And the said parties of the first part, for themselves and their heirs, executors, and administrators, do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they will forever warrant and defend said premises against the claims of all persons, claiming or to claim by, through, or under them only.

To have and to hold said described premises unto the said party of the second part, his heirs, executors, administrators, and assigns, forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals.

Witness to thumb mark signatures:

/s/ EDNA BIZER HILLAIRES

/s/ C. E. ANDRES

/s/ LISA ANDRES

/s/ ALEXIS GEORGE

/s/ C. E. ANDRES

/s/ LISA ANDRES

/s/ LUCINDA GEORGE

/s/ C. E. ANDRES

/s/ LISA ANDRES

/s/ JOSEPH HILLAIRES

/s/ C. E. ANDRES

/s/ LISA ANDRES



/s/ SARAH DESCANUM  
(Her Thumb Mark)

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ HENRY KWINA  
(His Thumb Mark)

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ CECELIA MORRIS

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ JOSEPH JEFFERSON

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ MARY GEORGE  
(Her Thumb Mark)

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ AGNES G. PHAIR

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ JULIA ANN JEFFERSON

/s/ C. E. ANDRES  
/s/ LISA ANDRES

/s/ MARY ANN KITTLES

/s/ C. E. ANDRES  
/s/ N. W. JAMES

/s/ AUGUSTINE YOUKTON

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ JOHN C. BROWN

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ JOHANNA GUERIN KELLY

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ MATILDA CURLEY

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ SARAH BOB

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ AGNES BOB

(Her Thumb Mark)

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ MAGGIE YOUCKTON

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ MINNIE WILLIAMS

/s/ C. E. ANDRES

/s/ N. W. JAMES

/s/ HARRY PRICE

/s/ O. H. KELLER

/s/ LUCILLE J. MASON

/s/ DANIEL PRICE

/s/ O. H. KELLER

/s/ LUCILLE J. MASON

/s/ WILFRED PRICE

/s/ C. E. ANDRES

/s/ MABEL COTTON

/s/ WALTER F. DICKENS,

Legal Guardian for Elmer Brown, Mary Madeline Brown, Ethel Hillaire and Louis Hillaire, Minors.

/s/ ARNELLA E. SHELTON

State of Washington,  
County of Whatcom—ss.

This Is to Certify that on this 16th day of November, A.D. 1925, before me, C. E. Andres, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Edna Bizer Hillaire, Joseph Hillaire, Alexis George and Lucinda George, to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

/s/ C. E. ANDRES,

Notary Public in and for the State of Washington,  
Residing at Ferndale.

By similar forms and before the same Notary were taken and attached to said Deed the following acknowledgments:

By Sarah Descanum . . . . .	November 17, 1925
Henry Kwina . . . . .	November 17, 1925
Cecelia Morris . . . . .	November 17, 1925
Joseph Jefferson . . . . .	November 17, 1925
Mary George . . . . .	November 17, 1925
Agnes G. Phair . . . . .	November 17, 1925
Julia Ann Jefferson . . . . .	November 17, 1925
Mary Ann Kittles . . . . .	November 19, 1925
Augustine Youkton . . . . .	November 19, 1925
John C. Brown . . . . .	November 19, 1925
Johanna Guerin Kelly . . . . .	November 19, 1925
Matilda Curley . . . . .	November 19, 1925
Sarah Bob . . . . .	November 21, 1925
Agnes Bob . . . . .	November 28, 1925
Maggie Youckton . . . . .	November 28, 1925
Minnie Williams . . . . .	December 1, 1925
Daniel Price . . . . .	January 8, 1926
Henry Price . . . . .	January 8, 1926
Wilfred Price . . . . .	January 16, 1926

By similar form on the 28th day of June, 1926, and in the County of Snohomish was taken the acknowledgment before Bertah E. Dickens, a Notary



Public, of "Walter F. Dickens, legal guardian for Elmer Brown, Mary Madeline Brown, Ethel Hillaire and Louis Hillaire, minors."

[Endorsed]: Filed June 23, 1953, U.S.D.C.

[Endorsed]: Filed September 6, 1956, U.S.C.A.

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[Title of District Court and Cause.]

### NOTICE OF REMOVAL

To: Donald M. Bushnell, Attorney for Plaintiffs  
Herein:

Notice Is Hereby given that Cause No. 33,445, commenced in the Superior Court of the State of Washington for Whatcom County, is removed to the United States District Court for the Western District of Washington, Northern Division, at Bellingham, by means of petition filed in said Federal court.

/s/ J. CHARLES DENNIS,  
United States Attorney;

/s/ GEORGE E. HEIDLEBAUGH,  
Special Assistant to the  
United States Attorney.

[Endorsed]: Filed June 26, 1953.

[Title of District Court and Cause.]

ANSWER AS TO ALL PLAINTIFFS OTHER  
THAN PERCY HOOD AND GRACE HOOD,  
HIS WIFE

Comes now the United States of America, defendant, through its undersigned attorneys, and answers the complaint of Frank X. Imhof, Lyle Hunter and Loretta Hunter, his wife; Ruth Slater, a widow; Everett Matz and Nina Matz, his wife; Myrtle Bloxham, Arthur B. Watts and Margaret M. Watts, his wife, being all of the plaintiffs other than Percy Hood and Grace Hood, his wife, by moving to dismiss said complaint as to all plaintiffs other than the said Hoods on the ground that the Court is without jurisdiction of this action as to the claims of the said plaintiffs other than the said Hoods for the reason that the United States has not consented to suit. The consent of the United States extends only to actions in which it has or claims a lien, and those jurisdictional conditions are absent with respect to the claims of these plaintiffs other than the said Hoods.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ GEORGE E. HEIDLEBAUGH,  
Special Assistant to the  
United States Attorney.

[Endorsed]: Filed November 12, 1953.

[Title of District Court and Cause.]

ANSWER AS TO PLAINTIFFS PERCY HOOD  
AND GRACE HOOD, HIS WIFE

Comes now the United States of America through its undersigned attorneys and for answer to the complaint of Percy Hood and Grace Hood, his wife, admits, denies and alleges as follows:

I.

As to paragraph I of the complaint, defendant admits that the Court has jurisdiction of the subject matter of the suit under Title 28, U.S.C., Section 2410, and admits that the lands of plaintiffs Percy Hood and Grace Hood, his wife, described in the complaint are situated in Whatcom County, State of Washington, in the Western District of Washington, Northern Division, at Bellingham, Washington.

II.

As to paragraph II of the complaint, defendant admits the existence of the Lummi Indian Reservation for a long time prior to March 1, 1926, the title to the lands of which now are or have been held in trust by the defendant, and admits that said reservation is on the Delta of the Nooksack River, and admits that the plaintiffs Percy Hood and Grace Hood, his wife, own an interest in the lands described as belonging to them in the complaint, to wit: Lots 5, 6 and 7, Section 6, Township 38

North of Range 2 East, W.M., containing 79.82 acres, more or less, subject, however, to the provisions of the Act of March 18, 1926, Ch. 60, 44 Stat., 211, as supplemented by law. Defendant alleges that the other allegations in paragraph II of the complaint are irrelevant to the claim of plaintiffs Percy Hood and Grace Hood, his wife, and are, therefore, denied.

### III.

As to paragraph III of the complaint, defendant admits the enactment into law on March 18, 1926, of that certain statute known as Public Law No. 49 of the 69th Congress entitled "An Act for the Purpose of Reclaiming Certain Lands in Indian and Private Ownership Within and Immediately Adjacent to the Lummi Indian Reservation, in the State of Washington, and for Other Purposes," which statute is found in Chapter 60, at pages 211 and 212 of the Statutes at Large, Vol. 44, Part 2, and alleges that said statute is still in force. Defendant alleges the statute speaks for itself and, therefore, denies each and every other allegation contained in paragraph III of the complaint.

### IV.

As to paragraph IV of the complaint, defendant alleges that the allegations contained therein are irrelevant to the claim of the plaintiffs to whom this answer is directed, and are, therefore, denied.

### V.

As to paragraph V of the complaint, defendant



admits that neither Percy Hood and Grace Hood, his wife, plaintiffs herein, nor their predecessors in title, at no time executed any contract similar to that mentioned in paragraphs IV and V of the complaint with the defendant regarding the lands described in the complaint as owned by said plaintiffs; admits that the Secretary of Interior did allocate the expense of dike construction among certain lands in the reservation including that claimed by plaintiffs; admits that the dikes were constructed; admits that the Secretary did declare by public notice the cost of the project and the equitable share to be assessed against the lands benefited as required by statute; and alleges further that the other allegations in paragraph V of the complaint, although in part true, relate to lands in private ownership, are irrelevant to the claim of plaintiffs Percy Hood and Grace Hood, his wife, and are, therefore, denied.

## VI.

As to paragraph VI of the complaint, defendant admits that defendant and its agents assert a lien upon the lands alleged in the complaint to be owned by the plaintiffs Percy Hood and Grace Hood, his wife; admits that said lien constitutes a cloud upon the title to said land, which lien and cloud are asserted, among other places, in that certain letter dated May 1, 1950, from William Zimmerman, Jr., Acting Commissioner, Bureau of Indian Affairs, Department of Interior, a certified copy of which is attached to this answer and made a part hereof;

and denies each and every other allegation contained in paragraph VI of the complaint.

### VII.

As to paragraph VII of the complaint, defendant denies the same, except defendant admits the expenditure of money in the operation, maintenance and repair of the diking improvements; admits the charging of certain amounts thereof to the plaintiffs Percy Hood and Grace Hood, his wife; and admits the claiming by defendant of a lien against the lands described in the complaint as the lands of said plaintiffs, and alleges all to be in accordance with law, and denies that the United States is estopped to assert a lien upon the lands here involved.

### VIII.

As to paragraph VIII of the complaint, defendant admits that Percy Hood and Grace Hood, his wife, are the owners of the tract stated in the complaint to be owned by them, subject, however, to the Act of March 18, 1926, as supplemented, as alleged in the counterclaim, paragraph I; admits the execution and delivery of documents with certain minor differences, substantially as shown in Exhibits D, E and F attached to the complaint, except that it alleges herein as though a part hereof, the contents of paragraphs IV and V of the counterclaim following hereafter, and denies the other allegations contained therein, and further denies that the defendant is estopped to assert its lien upon the lands herein described.

Wherefore, the defendant denies that the plaintiffs Percy Hood and Grace Hood, his wife, are entitled to the relief sought in the complaint.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ GEORGE E. HEIDLEBAUGH,  
Special Assistant to the  
United States Attorney.

## EXHIBIT

United States  
Department of the Interior  
Bureau of Indian Affairs

Date: December 29, 1952.

Pursuant to Title 28, Section 1733, United States Code, I hereby certify that each annexed paper is a true copy of a document comprising part of the official records of the Bureau of Indian Affairs, Department of the Interior, in my custody:

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Bureau of Indian Affairs to be affixed on the day and year first above written.

[Seal]     /s/ C. E. LAMSON,  
Acting Executive Officer.

(Copy)

United States  
Department of the Interior  
Bureau of Indian Affairs  
Washington 25, D. C.

May 1, 1950.

In Reply Refer to:  
Irrigation 15024-49-341.4.

Mr. Percy Hood, President,  
The First National Bank,  
Ferndale, Washington.

Dear Mr. Hood:

This will acknowledge the receipt of your letter of March 22 making further reference to a lien for Lummi Diking Project charges against lands allotted to Mary Yah-him-a-loo, which you purchased from her heirs.

The land referred to is described as Lots 5, 6 and 7 of Section 6, Township 38 North, Range 2 East. Apparently no contract for the repayment of construction costs was ever made of record.

Section 2 of the Act of Congress approved March 18, 1926 (44 Stat. 212) created a lien against all Indian-owned lands of the project for the repayment of reimbursable construction costs properly assessable against the lands, and required that such a lien be recited in any patent issued for the lands prior to the reimbursement of the total amount chargeable against the lands.



The deed conveying the above-described lands to you was approved by the Department August 10, 1926, after passage of the Act of March 18, 1926, and, by oversight, contains no lien clause. The omission from Government deeds and land patents of provisions which are required by Act of Congress to be placed therein, does not release a landowner from conditions imposed by law. See *United States v. Joyce*, 240 Fed. 610. Deeds omitting provisions required by law carry all of the rights which the law confers. (*Davis's Administrator v. Weibold*, 139 U.S. 507; *Deffeback v. Hawks*, 115 U.S. 392.) In these circumstances, the statutory lien declared by Congress to exist against the land will continue in force until the charges against the land are paid in full.

Sincerely yours,

[Seal]      /s/ WILLIAM ZIMMERMAN, JR.,  
Acting Commissioner.

[Endorsed]: Filed November 12, 1953.

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[Title of District Court and Cause.]

### COUNTERCLAIM

By way of Counterclaim against the plaintiffs, Percy Hood, and Grace Hood, his wife; and the marital community thereof, the United States, defendant herein, alleges:

## I.

Jurisdiction is founded in this Counterclaim upon the existence of a question arising under particular Federal statutes as follows:

Act of June 25, 1948, ch. 646, 62 Stat. 933;

Act of March 18, 1926, ch. 60, 44 Stat. 211;

Act of July 3, 1926, ch. 771, 44 Stat. 856;

Act of February 14, 1931, ch. 187, 46 Stat. 1129;

Act of February 17, 1933, ch. 98, 47 Stat. 832;

Act of November 4, 1933, ch. 282, 47 Stat. 1608;

Act of June 22, 1936, ch. 691, 49 Stat. 1772.

## II.

Defendant alleges that Lots 5, 6 and 7, Section 6, Township 38 North, Range 2 East, are within the Lummi Indian Reservation; that at the time of the enactment of the Act of March 18, 1926, ch. 60, 44 Stat. 211, said lands were in Indian ownership within the meaning of said terms in said statute.

## III.

That the Secretary of Interior has expended certain sums of money to effectuate the purposes of said statute, as supplemented, and as a consequence of said statutes and expenditures, on April 30, 1952, the sum of \$1,830.24, plus payments, interest and

penalties due since that date, is due the United States, determined as follows:

Serial No. 26, Percy Hood, Lots 5, 6 and 7, Sec. 6, Twp. 38 N., R 2 E.

Total construction assessments unpaid April 30, 1952 (19—\$19.97 installments due) .....	\$ 379.43
Interest to April 30, 1952.....	329.38
	<hr/>
Total due for construction.....	\$ 708.81
Total operation and maintenance assessments unpaid April 30, 1952.....	747.12
Unpaid penalty charges computed to April 30, 1952.....	374.31
	<hr/>
Total due for Operation and maintenance .....	1,121.43
	<hr/>
Total operation-maintenance, and construction assessments due April 30, 1952, with interest and penalties to April 30, 1952.....	\$1,830.24
	<hr/> <hr/>

That pursuant to said statutes a lien is imposed upon said lands to secure said sums due; that said sums are unpaid, are now due and owing to the United States; that repeated demand has been made for such payment, and the United States is entitled to foreclose said lien against said property.

#### IV.

That as of the date of the filing of this Counterclaim, the plaintiffs, herein, Percy Hood and Grace Hood, his wife, and the community thereof, owned an interest in said property; that prior to the acquisition of said interest, the property was owned in restricted title by certain Indian heirs of the original Indian Patentee from the United States under a restricted patent; that the restricted patent left in the United States, as trustee, the underlying fee in said lands,

which were allotted lands under the laws of the United States relating to grants to Indians; that at the time of the effective operation of Exhibits A and B attached hereto, said lands were, and now continue to be, subject to the provisions of the Act of March 18, 1926, as supplemented, citations supra, imposing a lien thereon; that Exhibit A attached hereto is a certified copy of Memorandum of Sale of Allotted Land for the land here involved; that Exhibit B is a certified copy of Indian Deed Inherited Lands for the land here involved; that certified black on white photostats will be substituted for Exhibits A and B when received.

#### V.

That said property is now owned by Percy Hood and Grace Hood, his wife, and the community thereof, subject to said lien; that the Memorandum of Sale of these allotted lands, although dated November 10, 1925, was in fact not received by the Tulalip Indian Agency until June 4, 1926, nor received by the Bureau of Indian Affairs until July 6, 1926, nor approved by the Assistant Secretary of Interior until August 10, 1926; that although the deed to plaintiffs Hood to these lands is dated November 10, 1925, it was placed in escrow and was not executed or acknowledged by all of the Indian heirs until June 28, 1926, and was not delivered to the purchasers (Hoods) until after it had been approved by the Assistant Secretary of Interior on August 10, 1926; that nothing in the transactions mentioned in this paragraph V takes said



lands out of the classification of lands in Indian ownership as used in the Act of March 18, 1926, as supplemented, citations supra.

Wherefore, the United States of America, defendant herein, prays this court as follows:

1. That the said lien be foreclosed;
2. That the United States Marshal be directed to seize said property by decree of this Court;
3. That the Court order the United States Marshal to sell the said land and give a deed thereto, free and clear of all claims and liens save as may be proved in this proceedings, and save the lien of the United States mentioned herein;
4. That from the proceeds of said sale all costs, charges and expenses of this proceeding and this sale be paid; that the claim of the United States alleged in paragraph III hereof be paid, together with reasonable attorney's fees in the sum of \$500.00;
5. That if there are any proceeds in excess of these payments, that they be given to the person or persons lawfully entitled to the same; and
6. That the Court grant such other and further relief as may be just and proper.

/s/ CHARLES P. MORIARTY,  
United States Attorney;

/s/ GEORGE E. HEIDLEBAUGH,  
Special Assistant to the  
United States Attorney.

## EXHIBIT A

[Exhibit A attached to the foregoing is identical to Exhibit E attached to the Complaint, set out in full at pages 28 to 31 of this printed record.]

## EXHIBIT B

[Exhibit B attached to the foregoing is identical to Exhibit F attached to the Complaint, set out in full at pages 31 to 38 of this printed record.]

[Endorsed]: Filed November 12, 1953.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANTS PERCY HOOD  
AND GRACE HOOD TO COUNTERCLAIM  
OF THE UNITED STATES

For Answer to the Counterclaim of the United States against the Plaintiffs, Percy Hood and Grace Hood, the said Plaintiffs allege:

## I.

They admit that the lands described in Paragraph II of the Counterclaim are within the Lummi Indian Reservations but deny all remaining allegations of said Paragraph.

## II.

As to the allegations of Paragraph III of the Counterclaim, they admit that the Secretary of the

Interior caused to be expended certain sums in compliance with said Act, or of said Act as supplemented; they admit that repeated demands were made of them by the Defendant for payment of the sums claimed by it to be due; they deny all other allegations of said Paragraph III, and in particular deny that even if any sums may be found to be due for constructions, assessments and interest thereon that any other sums for operation, maintenance or penalties thereafter became due; they further state that even if any construction assessments became due that they are without knowledge or information sufficient to form a belief as to the correctness of the amounts for such items stated in said Paragraph III and therefore deny the allegations of such amounts.

### III.

These Plaintiffs as to Paragraph IV admit that at the time of filing the Counterclaim, they and their marriage community owned an interest in said property, and that the said property was owned by certain Indian heirs of the original Indian Patentee, to wit Mary Ya-Him-Aloo, under a patent from the United States; and admit that said lands were "allotted" under the laws of the United States relating to grants on the Lummi Indian Reservation; they admit that Exhibit A attached to the Counterclaim is a copy of "Memorandum of Sale of Allotted Land" for the land here involved and that Exhibit B is a copy of a copy of "Indian Deed

of Inherited Lands''; that they deny each and every other allegation of said Paragraph IV.

#### IV.

That as to the allegations of Paragraph V of the Counterclaim these Plaintiffs admit that they now own the said property and that the said Memorandum of Sale on its face bears endorsement by the Assistant Secretary of the Interior as of August 10, 1926, and that the deed to them was placed in escrow and that it was not delivered to them until subsequent to the endorsement of his approval thereon by the said Assistant Secretary of the Interior, and in fact not until a year or more thereafter and upon payment by them of the balance owed under said Memorandum of Sale; that they deny each and every other allegation of said Paragraph V.

#### V.

That by way of new matter these Plaintiffs incorporate herein by reference the allegations of their Complaint in this Cause, and in particular the allegations of Paragraph VIII thereof and the Exhibits referred to therein, and in amplification thereof further state, that the Defendant, the United States, in the exercise of its jurisdiction and duties over Indians did so through the Department of Interior, and by the Bureau of Indian Affairs of said Bureau, and with reference to the Lummi Indians, and all matters in controversy in this Cause, by and through its Tulalip Indian Agency, of which, at all times material hereto,



Walter F. Dickens was the Superintendent and Disbursing Agent. That the giving of approval to the conveyances of Indian lands involved in the Lummi Indian Reservation was at such times exercised in accordance with the rules, regulations and practices established by said Department, and together with the pertinent statutes of the United States controlling the granting of such approval by the Secretary of the Interior; that all proceedings and things done and leading up to the approval of the Memorandum of Sale and the Deed of Inherited Lands hereinbefore mentioned were done pursuant and in accordance with such rules, regulations and practices, and that upon compliance therewith, as in this instance, the approval became mandatory and ministerial; that the exact text, nature and quality of such regulations and practices are solely within the knowledge of the Defendant but that these Plaintiffs are informed and believe that the same required of adult Indian owners of patented lands desiring the sale thereof to request or petition the said Department, or the Superintendent of said Agency as its agent to arrange such sale; that thereby such Agent, in proceedings consequent thereto, became also the agent of said owners; that thereupon it became the duty of such agent to cause an appraisal to be made of the lands and to cause advertisements and notices of such sale with call for bids to be given in manner and form specified by such regulations, and in the event that bids within the amounts permitted by such regulations were made such Agent was authorized

to accept such bid and in such event, in the absence of fraud, and upon compliance with the terms of such bid the owners became obligated to convey, and the Secretary to approve.

That pursuant to such practice and regulations the adult owners named in said Deed, other than those specified therein as minors, make such request to the said Dickens, as Superintendent, to thereupon follow the procedure above set forth, whereupon these Plaintiffs did bid the sum of Ten Thousand and One Hundred Dollars (\$10,100.00) for said land, and did tender an initial payment, as required by the terms of such advertisements of \$2,525.00, and four notes payable, respectively, one, two, three and four years thereafter; that such bid was the only, or in any event, the best bid submitted, and that the said Dickens pursuant to the authority vested in him did thereupon and with these Plaintiffs execute said Memorandum of Sale in duplicate and did take the said initial deposit and said notes; that thereby, pursuant to the provisions set forth therein, and to the rules, regulations and practices aforesaid the Secretary of the Interior became obligated, upon further full performance by these Plaintiffs, to approve the conveyance to them; that it was also understood and agreed that these Plaintiffs could take possession and they did so some time prior to the end of 1925, and in reliance upon the promises of the said Dickens as aforesaid and prior to March 18, 1926, they obtained a tenant and made other preparations to, and did initiate farming operations thereon; that at the time of such pur-

chase these Plaintiffs obtained the advice of an attorney as to the title and were informed by him that in order to assure the merchantability of the title it would be necessary that certain undivided interest of minor heirs, to wit a  $2/864$ ths undivided interest therein in Ethel Hillaire, and a like interest in Louis Hillaire, and a  $8/864$ ths undivided interest for each of the minors of Elmer Brown and Mary or Madeline Brown be sold under a guardian to be appointed by the Superior Court of the State of Washington, for Whatcom County, in which county they resided, acting in probate pursuant to the laws pertaining thereto of the State of Washington; that at the time of said transactions said Dickens agreed to cooperate in such respects in order to facilitate the sale of the adult interests and on November 30, 1925, he caused to be filed in said court his petitions for appointment as guardian of the estates, in one cause of the said Ethel Hillaire and Louis Hillaire, and in another cause of said Elmer Brown and Mary Brown, and after due and proper proceedings he was on December 14, 1925, appointed and did qualify as guardian in each such cause, and on February 6, 1926, did petition for authority to sell said undivided interests in and to said real property; that due proceedings were had pursuant to each such petition resulting in due course in a sale of the said interests of the said minors to the Plaintiff, Percy Hood, which sale was thereafter duly confirmed; that pursuant to such a sale and confirmation the said Dickens executed



a separate conveyance for the said interests of the Hillaire minors to said Plaintiff and a separate conveyance for the said Brown minors, and did also sign the said "Indian Deed of Inherited Lands" as their guardian;

That in all such actions the said Dickens represented and was the agent of the said Secretary of the Interior; that he received the said Memorandum of Sale on the date thereof and by so doing the said Secretary, and the Department of the Interior, and the Bureau of Indian Affairs did then receive the same, regardless of any reception date stamp thereon by the office of said agency or of said Department; that at all times after making their said deposit of \$2,525.00, and the giving of their said notes and the execution of said Memorandum of Sale these Plaintiffs were obligated to take and pay for said land, except upon forfeiture of not less than the said \$2,525.00 and the said Secretary was obligated in good faith to use all proper means to effectuate a conveyance to them, subject to their payment of the said notes; that upon the execution of said Memorandum of Sale they became vested with a present equitable title in said land; that the said "Indian Deed Inherited Lands" was dated as of the same date as the said Memorandum in order to reflect the intention of the parties that notwithstanding the passage of time required to obtain the signatures and acknowledgments of the adult heirs and the proper conveyance of the interests of the minor heirs under the probate laws



of the State of Washington that the delivery of said Deed should be considered to be effective as of said date, and also that the approval of the said Secretary thereto should relate back to said date; that the Defendant up to 1950 did treat said lands as being in private ownership, and up to said time did solicit and urge these Plaintiffs to sign lien contracts for the payment of said claimed assessments on its assertion that said land was privately owned; that by reason of all of the facts and circumstances hereinbefore pleaded, the Defendant, the United States is estopped to impose any additional lien upon the interests of these Plaintiffs therein as so acquired, and in equity and good conscience said defendant is bound to recognize the date of November 10, 1925, as the effective date for the vesting of the title of the interests of the Plaintiffs in and to the land involved in this cause.

## VI.

These Plaintiffs further state that regardless of whether these Plaintiffs purchased the said land prior to the enactment of the Act of March 18, 1926, or not, the fee title therein at that time was vested by reason of the patent from the United States hereinbefore mentioned to Mary Ya-Him-Aloo, or her heirs, subject only to the restriction upon alienation consisting of the requirement that the Secretary of the Interior approve any alienation, and that the same was private property, and either was not "Indian land" within the meaning of the said Act, or if construed so to be then the

a separate conveyance for the said interests of the Hillaire minors to said Plaintiff and a separate conveyance for the said Brown minors, and did also sign the said "Indian Deed of Inherited Lands" as their guardian;

That in all such actions the said Dickens represented and was the agent of the said Secretary of the Interior; that he received the said Memorandum of Sale on the date thereof and by so doing the said Secretary, and the Department of the Interior, and the Bureau of Indian Affairs did then receive the same, regardless of any reception date stamp thereon by the office of said agency or of said Department; that at all times after making their said deposit of \$2,525.00, and the giving of their said notes and the execution of said Memorandum of Sale these Plaintiffs were obligated to take and pay for said land, except upon forfeiture of not less than the said \$2,525.00 and the said Secretary was obligated in good faith to use all proper means to effectuate a conveyance to them, subject to their payment of the said notes; that upon the execution of said Memorandum of Sale they became vested with a present equitable title in said land; that the said "Indian Deed Inherited Lands" was dated as of the same date as the said Memorandum in order to reflect the intention of the parties that notwithstanding the passage of time required to obtain the signatures and acknowledgments of the adult heirs and the proper conveyance of the interests of the minor heirs under the probate laws

of the State of Washington that the delivery of said Deed should be considered to be effective as of said date, and also that the approval of the said Secretary thereto should relate back to said date; that the Defendant up to 1950 did treat said lands as being in private ownership, and up to said time did solicit and urge these Plaintiffs to sign lien contracts for the payment of said claimed assessments on its assertion that said land was privately owned; that by reason of all of the facts and circumstances hereinbefore pleaded, the Defendant, the United States is estopped to impose any additional lien upon the interests of these Plaintiffs therein as so acquired, and in equity and good conscience said defendant is bound to recognize the date of November 10, 1925, as the effective date for the vesting of the title of the interests of the Plaintiffs in and to the land involved in this cause.

## VI.

These Plaintiffs further state that regardless of whether these Plaintiffs purchased the said land prior to the enactment of the Act of March 18, 1926, or not, the fee title therein at that time was vested by reason of the patent from the United States hereinbefore mentioned to Mary Ya-Him-Aloo, or her heirs, subject only to the restriction upon alienation consisting of the requirement that the Secretary of the Interior approve any alienation, and that the same was private property, and either was not "Indian land" within the meaning of the said Act, or if construed so to be then the

attempted imposition of a lien thereon by force of such statute and without the consent or agreement of said owner-heirs was in excess of the powers of the Congress and void.

Wherefore, these Plaintiffs pray that the said Counterclaim of the Defendant, the United States, be dismissed at its cost.

/s/ DONALD M. BUSHNELL,  
Ferndale, Washington.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ W. E. EVENSON,  
Attorneys for Plaintiffs,  
Percy Hood and Grace Hood.

Receipt of copy acknowledged.

[Endorsed]: Filed January 28, 1955.



In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 121

FRANK X. IMHOF, et al.,

Plaintiffs,

vs.

UNITED STATES,

Defendant.

Before Judge Bowen.

### COURT'S ORAL OPINION

Monday, March 19, 1956

The Court: As to the Hood property and the action of the plaintiffs as it concerns the Hood property, the Court finds, concludes and decides against the contentions and prayer of the plaintiffs because before that property, the Hood property, was delivered to the Hoods the Congress passed an Act requiring this further condition (as to assessments), and I am of the opinion and hold that it was within the proper scope of congressional legislative power to do that and to make the provisions and effects of such new legislative requirement valid as against this property, the legal title to which was still in the United States of America at the time that Act was passed, notwithstanding that escrow arrangements or arrangements in the nature of an escrow had been made as of an earlier date, and

That in consequence thereof as to the Hood property plaintiffs take nothing against the United States of America by reason of this action;

That as to all of the non-Hood plaintiffs the Court finds in favor of the plaintiffs, both as to jurisdiction and as to the merits of the action; and

As to such other properties of the non-Hood plaintiffs it is the finding, conclusion and decision of the Court that all the material allegations of plaintiff's complaint are sustained by a preponderance of the evidence in this case and that plaintiff may have the judgment of the Court accordingly. Particularly as to the issue of jurisdiction concerning the complaints of the non-Hood plaintiffs and concerning the objection of the United States made in its answer to the complaints of such non-Hood plaintiffs, "By moving to dismiss said complaint as to all plaintiffs other than the said Hoods on the ground that the Court is without jurisdiction of this action as to the claims of the said plaintiffs other than the said Hoods for the reason that the United States has not consented to suit," this Court rules against the contentions of defendant United States of America and finds that all of such non-Hood plaintiff's causes of action in their complaints asserted are actions to quiet title to their land against whatever claims the United States of America now or may hereafter assert against plaintiffs' lands. The United States has consented to be sued in actions of that type under the terms and provisions of 28 U.S.C.A., Section 2410.

Is there any issue not covered by what the Court

has said already as a part of its decision? If so, will you remind me of what issue you think has not been disposed of?

Mr. Evenson: Well, I am aware, your Honor, that Mr. Bushnell has in mind that under this Act there was to be no interest on these assessments. I am not as familiar with that point as he is, but I think your Honor has not commented, of course, on that phase of it.

The Court: Was that covered in the prior argument? That point was covered during the trial, but was it covered in the prior arguments?

Mr. Bushnell: No, sir.

The Court: I will hear you.

Mr. Bushnell: I am assuming that your Honor is granting the prayer of the United States cross-complaint to foreclose their alleged lien against Mr. Hood. In that prayer they asked for interest. Now, their whole case is bottomed on the theory that that was Indian land, and of course that's the foundation of your Honor's decision, as I understand it.

Now, the Act of March 18, 1926, says in Section 4 that, "The Secretary is authorized to declare by public notice the cost of the project, the equitable share to be assessed against the lands benefited in accordance with their respective benefits, which costs shall be repaid in annual installments, the first installment to be five per cent of the total charge, the remainder of the said cost with interest on deferred amounts against land in private ownership from the date of said public notice, to be four

per cent per annum until the obligation is paid in full.”

Well, it doesn't say “nothing” for the Indian, but it implies that there will be no interest on Indian land, so I think that clearly the government can't have its pie and eat it too.

The Court: The Court further finds, concludes and decides that defendant recover against the plaintiffs Hood on defendant's Counterclaim in the principal amount of defendant's claim against plaintiffs Hood without interest.

[Endorsed]: Filed August 30, 1956.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

### Findings of Fact

#### I.

That this action is brought to quiet respective titles of the plaintiffs against liens alleged to be asserted and claimed thereon by the United States. The lands are situated in the County of Whatcom, State of Washington, and within the original boundaries of the Lummi Indian Reservation. The



action is brought under Section 2410, Title 28, United States Code.

## II.

That long prior to any date material to this cause, the defendant, United States, established said Lummi Indian Reservation, and in its capacity as guardian of and in trust for the members of the Lummi Tribe of Indians, did originally hold title to the lands within the said Reservation. Thereafter, and prior to the month of March, 1926, by process of allotment and patenting in severalty, and by sale and conveyance, certain tracts within the said Reservation became owned in private ownership, among which are those now owned by the plaintiffs (except the plaintiffs, Percy Hood and Grace Hood, his wife), which at said time were owned in fee simple by said plaintiffs or by their respective predecessors in title; that tracts, respectively so owned by said plaintiffs are as follows:

By Frank X. Imhof (who is married to Patricia Imhof)

Lots 2 and 9, and the SW4 NE4, and the NW4 SE4, Sec. 6, Twp. 38N., R. 2 E.

By Lyle Hunter and Loretta Hunter his wife,  
Gov't Lot 3, Sec. 1, Twp. 38 N., R. 1 E.

By Everett Matz and Nina Matz, his wife,  
Gov't. Lot 3, Sec. 1, Twp. 38 N., R. 1 E.

By Ruth Slater (Mrs. Glen Slater)

Lots 3, 4 and 6, and the SW4 NW4 Sec. 2,  
Twp. 38 N. R. 1 E.

By Myrtle Bloxham

NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and Lot 13, Sec. 7, T. 38 N., R. 2 E. W. M., except a triangular parcel of land in the southwest corner of said Gov't Lot 13, lying southwest of Smuggler Slough; also a triangular parcel of land in Lot 8, south of said Lot 13, between Smuggler Slough and Slater Slough.

By Arthur B. Watts and Margaret M. Watts, his wife,

NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  (Gov't Lot 4) in Section 1, T. 38 N., R. 1 East of W. M., less roads.

### III.

That by its Act of March 18, 1926, (44 Stat. at Large, 211-212) the Congress of the United States appropriated the sum of \$65,000.00 for the reclaiming by construction of dikes of approximately 4,000 acres of land in Indian and "private ownership" within and immediately adjacent to the Lummi Indian Reservation aforesaid and providing among others that the total costs of the project should be distributed equitably among the lands in Indian ownership and those in private ownership which might be benefited thereby in accordance with the benefits to be ascertained and designated by the Secretary of the Interior, and providing that no part of the sum provided for construction could be expended on account of lands in private ownership until appropriate repayment contracts in form to be approved by the said Secretary should

have been properly executed by the landowners whose lands might be benefited by the project and providing that the said Secretary might declare by public notice the cost of the project and the equitable share to be assessed against the benefited lands to be paid in twenty (20) annual installments with interest at 4% per annum on the deferred portions thereof.

#### IV.

That thereafter, and in preparation for the construction of such dike, the defendant's then Secretary of the Interior did purport to determine that certain lands, including those owned by the said plaintiffs were lands in "private ownership" within the meaning of that statute and that the same would be benefited by the construction of such dike, and he did by his agents then solicit the then owners of said lands of the plaintiffs to enter into such repayment contracts, severally, with him in behalf of the defendant whereby each such owner would agree, among other things, to pay the defendant such pro rata share of the entire costs of such Lummi Diking Project, and all of the betterment, operation and maintenance charges and penalties in connection therewith, and would further agree that their respective lands would be by such contracts at once burdened with a first lien in favor of the defendant to secure the payment of such costs.

#### V.

That the said then owners of said lands did refuse to execute such contracts and no such contracts

affecting said lands have ever been executed; that although the said Secretary or his successors did purport to ascertain and determine that the said lands would be benefited by said construction, he and/or his successors did thereafter construct such dikes;

## VI.

That thereafter on August 19, 1930, the said Secretary promulgated his "Public Notice," being the Notice referred to in said Act, reciting that he was acting in pursuance to the said Act and purporting to distribute the "total cost of the Project \* \* \* equitably \* \* \* among the lands benefited by the Project," and stating that "the construction costs assessed against each acre of land benefited by the Project is stated in the schedule of charges, referred to therein, and by reference made a part of said Notice, and providing for a schedule of payments over a period of twenty (20) years, and providing that the Secretary might take such action as he might deem proper to enforce payment thereof under the provisions of said Act and of contracts "executed with the respective landowners"; that said "Public Notice" is filed in the National Archives, and appear in C.F.R. 1949, Title 25, Part 144, page 177, and was published shortly after its promulgation in a newspaper of general circulation in said Whatcom County, Washington; that said Notice further indicated that such schedules would be and the same were filed with the engineer of the Bureau of Indian Affairs and the Superintendent of the "Lummi Reservation at Tulalip, Washing-



ton": that in such schedules and otherwise, the defendant, the United States, by its agents has listed and itemized the above-described tracts of the plaintiffs and caused it to be made to appear therefrom that parts of the construction costs of said improvement "were assessed" against each such tract of land.

#### VI(a).

That consistently since the giving of said public notice the defendant by its Bureau of Indian Affairs has annually, or at more frequent intervals, sent bills or statements to the respective owners of said tracts purporting, on the faces thereof to be statements of charges or assessments against said lands and for operation and maintenance charges, and being on standard forms prescribed by the Comptroller General of the United States, and bearing numbers and data identifying such charges with such schedules. That the past and present policy of the said Bureau, and particularly of the agents in charge of said Diking Project has been and is to respond to all inquiries as to the existence of liens against or charges in connection with said Project and as to the respective properties of the plaintiffs aforesaid by stating that there was due and owing to the United States such amounts as might remain unpaid of the respective "assessments" above mentioned and scheduled and have made such statements as to the said lands of each of said plaintiffs, and in open court such agents stated that such responses would be made to any

current inquiries, including any inquiries on behalf of prospective purchasers of said lands; that the existence of books of records containing such "assessments" and the policy of said Bureau to bill for the same and to assert them in response to inquiries has become generally known in the vicinity of the said lands, and have clouded, or tended to cloud the title of the said plaintiffs to their respective tracts.

## VII.

That the lands of the plaintiffs, Percy Hood and Grace Hood, involved in this cause are described as

Lots 5, 6 and 7, Section 6, Township 38 North of Range 2 E. W. M., containing 79.82 acres more or less.

That pursuant to treaty between the United States and the Lummi Indians the said tracts were first allotted and later patented to "Mary Ya-Him-A-Loo or Mary" by the United States by its patent issued and dated December 31, 1885, copy of which as Exhibit D was made part of the complaint in this cause and by reference made part of this Finding; that by its pertinent provisions the United States did "give and grant" said tracts to said grantee, subject to a stipulation that "the same should not be aliened, "and to have and to hold the same unto "her and her heirs forever, with the stipulation aforesaid"; that the same and similar patents were known and referred to by the Indian Bureau as "restricted fee patent"; that thereafter Congress provided that pursuant to and in conform-

ity with legislation and regulations of the Bureau of Indian Affairs providing for the release of such restrictions and the alienation of such lands, and of the request of the heirs of Mary Ya-Him-A-Loo (to whom title to said property had descended upon her death), and after formal invitation to bids, had brought no offers, the plaintiff, Percy Hood, at the suggestion of the Commissioner of Indian Affairs, made an offer, which was incorporated into an Indian Bureau form entitled "Memorandum of Sale," on and under date of November 10, 1925, copy of which, as Exhibit E thereto was made part of the complaint, and which by reference is incorporated herein; and prepared and signed in behalf of said Department by "W. F. Dickens, Superintendent and Disbursing Agent" of the Agency having charge thereof, and by the plaintiffs Percy Hood and Grace Hood, which recited that the Hoods "having on November 10, 1925, purchased" said tract for \$10,100.00, and "having made a payment of \$2,525.00" thereon and "agreed to pay the balance, \$7,575.00, in deferred payments as evidenced by four promissory notes of even date herewith for \$1,893.75 each" payable "to the Superintendent" of the Agency in charge, "on or before 1, 2, 3 and 4 years after date, with interest at the rate of six per cent per annum from the date of approval of this memorandum by the Secretary of the Interior," and providing "that upon payment in full" of said balance "according to the tenor and effect of said notes, then and in such case a deed duly executed by said heirs of Mary Ya-Him-A-Loo,

and approved by the Secretary of the Interior," should "be delivered" to the said Hoods, "conveying said land to them," and further providing that in the event of default in payment of such principal or interest, the sale might "at the option of the Secretary of the Interior, be cancelled, and said land re-advertised" and sold "and in such case the sum of \$2,525.00" out of any amounts which might have been paid by the Hoods would be forfeited to the "vendors," the heirs of Mary Ya-Him-A-Loo, and it was further agreed that said deed should "be retained in escrow by the Commissioner of Indian Affairs until all the notes and interest" should have been paid, when said deed should be delivered to them; that the said down payment and notes, so dated, were given by the Hoods to said Agent in charge on the same date, to wit November 10, 1925.

### VIII.

That at the same time, and bearing the same date of November 10, 1925, there was prepared at the office of said Agent the "Indian Deed of Inherited Land," a copy of which as Exhibit F was attached to and made a part of the complaint, which recited as grantors the names of some twenty-three heirs of Mary Ya-Him-A-Loo and the said W. F. Dickens, referred to as "Legal Guardian of" four named minor heirs, two having  $\frac{2}{864}$ ths and two having  $\frac{8}{864}$ ths undivided interests therein, and provided that in consideration of \$10,100.00, the grantors "do hereby grant, bargain, sell and convey unto" Percy Hood, his heirs and assigns forever,



the said real property, and that the grantors "covenant, promise and agree" with said Hood, his heirs and assigns, to "warrant and defend said premises against the claims of all persons, claiming or to claim by, through, or under them only"; that the said deed bears the signatures of all said adult heirs, and their respective acknowledgments taken at various dates from November 16, 1925, to January 16, 1926; that said signatures and acknowledgments were obtained by or through said Indian Agency.

### IX.

That after the making of said "Memorandum of Sale" Walter F. Dickens, the Superintendent of the Agency, procured the appointment of himself to be the guardian of the four minor heirs, in separate causes, in the Superior Court of Whatcom County, Washington, and thereafter proceedings were had thereunder in which he was authorized and did sell the interests of the said minors to Percy Hood; that the consideration recited in said probate proceedings was the proportion of the total consideration of \$10,100.00 required of the Hoods which was in ratio to their respective undivided interests; that in fact the Hoods paid no other or separate consideration than the original offer of \$10,100.00 except for interest on their deferred notes, and made no separate nor distinct bid in the guardianship proceedings; that the return of sale in said proceedings referred to the sale as being made after March 8, 1926, but did not specify any date but the orders of confirmation

were entered on June 4, 1926; that thereafter the "Memorandum of Sale," which had been withheld from the Hoods up to that time and the said deed, the latter being plaintiffs' Exhibit II were sent to the Office of the Commissioner of Indian Affairs in Washington and both were thereafter approved on or about August 10, 1926, by the Secretary of the Interior by his Assistant; that thereupon one of the copies of the "Memorandum of Sale" was handed to Mr. Hood but said deed was held in escrow by said Superintendent; that on or about the month of April, 1928, and before the maturity of all of said notes the Hoods paid the balances due on said notes and said deed was delivered to them; that although the deed above mentioned was signed by said Walter F. Dickens as guardian and acknowledged by him on or about June 4, 1926, two deeds were given by him, respectively covering the said undivided interests of the said minors which were also duly approved on or subsequent to August 10, 1926, by the Secretary of the Interior;

#### X.

That in the "Schedule of Charges" incorporated by reference into the Public Notice heretofore mentioned the Secretary of the Interior classified the lands within the Project as W (for lands owned by white persons) and I (for lands owned by Indians); that in such Schedule he classified the said lands of Percy and Grace Hood as white owned; that at various times through his agents the Secretary so-

licited the said Hoods to sign repayment contracts; that they have never signed any such contract with reference to said lands; that as to lands in Indian ownership held under restricted fee patents repayment contracts were solicited of the owners and signed with respect to 48 out of 61 such tracts;

### XI.

That the total construction charges assessed by the Secretary of the Interior against the Hood land are \$399.40; that the total operation and maintenance charges assessed thereto computed to July 6, 1955 are \$1,270.77; that the United States claimed penalty charges on said operation and maintenance charges as of July 6, 1955, in the amount of \$561.99, all of which \$561.99 is disallowed by the Court.

### XII.

That there is no showing that any patent was ever issued by the United States as to the Hood land after the going into effect of the Act of March 18, 1926, and the title of the Hoods derived only through said conveyance by or for the heirs of Mary Ya-him-a-loo.

Done in Open Court this 7th day of May 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

From the foregoing Findings of Fact the Court makes the following

### Conclusions of Law

#### I.

That as to the lands of the plaintiffs other than the Hoods, the United States by the acts of its agent claims and assets a lien against the same, and that under 28 U.S.C.A. 2410 this court has jurisdiction to entertain the complaint of said plaintiffs.

#### II.

That the said claims of the United States as to said properties described and identified in Finding II are without foundation and void, and said plaintiffs are entitled to have their titles quieted against the same.

#### III.

That the said lands owned by the plaintiffs Hood are Indian lands within the meaning of the Act of March 26, 1926.

#### IV.

That legal title to said Hood lands remained in the United States until final payment of the purchase price and delivery of the conveyance of the Ya-him-a-loo heirs to the Hoods in 1928, after the passage of the Act of March 26, 1926.

#### V.

That notwithstanding that the "Memorandum of Sale" was made with the Hoods and they had paid a substantial portion of the purchase price and



given notes for the remainder and escrow arrangements for the delivery of the deed to them had been made, prior to the Act of March 18, 1926, and the other facts set forth in Findings VII, VIII and X, it was within the power of Congress to subject such lands to an involuntary lien to secure the payment to the United States of costs of the Lummi Diking Project apportioned among said lands; that such lien was created by the Act of March 18, 1926; that said lien covers only the construction charges amounting to \$399.40 and also for operations and maintenance charges of \$1,270.77 to July 6, 1955; that the United States is entitled to judgment and order of foreclosure sale against the plaintiffs Hood foreclosing such lien against their lands above described and selling the lands to pay for the total sum of \$1,670.17 without costs to either party, and the United States to pay accruing costs and the costs of sale.

Done in Open Court this 7th day of May, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

CONCLUSIONS OF LAW PROPOSED BY  
PERCY HOOD AND GRACE HOOD

The plaintiffs, Percy Hood and Grace Hood, respectfully propose and request the making of the following

Conclusions of Law

A.

That equitable title to the said lands of the Hoods passed to them on the execution of the "Memorandum of Sale" and the payment of one-fourth of the purchase price in cash and the remainder in promissory notes on November 10, 1925, prior to the Act of March 18, 1926, under the doctrine of equitable conversion, and that such title became a full legal title upon payment of the balance of the purchase price, delivery of the "Indian Deed of Inherited Land" in 1928, and such equitable title could not be impaired and was not impaired by the subsequent Act of March 18, 1926.

B.

That the approval of the Secretary of State to said "Memorandum of Sale" and "Indian Deed of Inherited Land," although given on August 10, 1926, and though the said deed was physically delivered in 1928 on final payment of said purchase money notes then related back, so far as the United

States and the grantors herein to the date it bore, namely November 10, 1925.

C.

That notwithstanding the stipulation in the patent to Mary Ya-him-a-loo restricting the rights of herself and her heirs to alienate the same, the quality of their title thereunder was that of a title in fee simple.

D.

That the title of the Indian grantors in said "Indian Deed of Inherited Land" at the time of the execution of said "Memorandum of Sale," and their interests thereafter held at the passage of the Act of March 18, 1926 was such that said lands were not "Indian Lands" but "Lands in Private Ownership" within the meaning of said Act.

E.

That the only liens (other than contractual liens) authorized or created by the Act of March 18, 1926 were those provided in Section 2 thereof against Indian lands which had not yet been "patented"; that the said Section 2 could not and did not refer to the lands now owned by the Hoods, the same having been long since "patented."

F.

That the title of the Indian owners of said land, the heirs of Mary Ya-him-a-loo, being a fee, could not constitutionally be impaired or subjected to an

involuntary lien in favor of the United States without due process of law; that the Act of March 18, 1926 insofar as it might be held to apply to the lands of said heirs afforded no due process of law either to them or to the Hoods as their assigns, or potential assigns, and if said Act and said Section 2 in particular were intended to impose an involuntary lien or be construed as so doing, it is unconstitutional and void, and contrary to the 5th Amendment of the U. S. Constitution.

#### G.

That if said Act of March 18, 1926 created any lien against said lands, such lien came into existence only upon the making of the Public Notice under said Act, to wit on August 19, 1930, and did not affect the title of the Hoods, which in any event became vested not later than the delivery of said Deed in 1928.

#### H.

That in the proceedings relating to the sale of said lands the United States was acting as an agent for, and for the private benefit of said Indian owners, the Ya-him-a-loo heirs, and otherwise at such time had no interest in said transaction; that in soliciting the Hoods to sign the "Memorandum of Sale," containing as it did the covenant and promise that the lands therein mentioned would upon final payment of the price be conveyed to the Hoods, and in connection therewith causing before the passage of the Act of March 18, 1926, the said "Indian



Deed Inherited Lands'' to be executed containing the warranty of title to the Hoods against any claim or lien through said heirs, the United States is estopped from doing any act or asserting any claim contrary, or which would have the effect of breaching such warranting, and that its action in now claiming a lien, which can be sustained only, if at all, because of such Indian ownership, would cause a breach of such warranty; that it would be inequitable for the United States to maintain such claim, and in equity and good conscience and in law it is barred from so doing.

Respectfully submitted,

/s/ DONALD M. BUSHNELL,  
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1956.

United States District Court, Western District  
of Washington, Northern Division

Civil Action No. 121

FRANK X. IMHOF, LYLE HUNTER and  
LORETTA HUNTER, His Wife; RUTH  
SLATER, a Widow; EVERETT MATZ and  
NINA MATZ, His Wife; MYRTLE BLOX-  
HAM, ARTHUR B. WATTS and MAR-  
GARET M. WATTS, His Wife, and PERCY  
HOOD and GRACE HOOD, His Wife,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT QUIETING TITLE AGAINST  
THE CLAIMS OF THE UNITED STATES  
OF AMERICA AS TO CERTAIN LANDS  
AND ESTABLISHING AND FORECLOS-  
ING A LIEN AGAINST OTHER LANDS

This Cause having come up regularly for trial on  
July 15, 1955, at Bellingham, Washington, before  
the undersigned judge of the above-titled court, the  
plaintiffs being represented by Donald M. Bushnell  
and W. E. Evenson, and the defendant, the United  
States of America being represented by Charles P.  
Moriarty, United States Attorney for the Western  
District of Washington, and Richard Harris, As-  
sistant United States Attorney, and evidence having

been submitted and the issues tried, and the court having been fully advised in the premises, and having heretofore made and entered its findings of fact and conclusions of law, now, therefore, it is hereby

Ordered, Adjudged and Decreed as follows that the United States of America has no right, title, interest, lien or claim in or to the lands of the plaintiffs in this cause (other than the lands of Percy Hood and Grace Hood, his wife), which lands are all located in Whatcom County, Washington, and the tracts of each of the plaintiffs herein being as hereinafter designated:

Lands of Frank X. Imhof (who is married to Patricia Imhof)

Lots 2 and 9, and the SW4 NE4, and the NW4 SE4, Sec. 6, Twp. 38 N., R. 2E.

Lands of Lyle Hunter and Loretta Hunter, his wife.

Gov't Lot 3, Sec. 1, Twp. 38 N., R. 1 E.

Lands of Everett Matz and Nina Matz, his wife.

Gov't Lot 3, Sec. 1, Twp. 38 N., R. 1 E.

Lands of Ruth Slater (Mrs. Glen Slater)

Lots 3, 4 and 6, and the SW4 NW4 Sec. 2, Twp. 38 N. R. 1 E.

Lands of Myrtle Bloxham.

NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and Lot 13, Sec. 7, T. 38 N., R. 2 E. W. M., except a triangular parcel

of land in the southwest corner of said Gov't Lot 13, lying southwest of Smuggler Slough; also a triangular parcel of land in Lot 8, south of said Lot 13, between Smuggler Slough and Slater Slough.

Lands of Arthur B. Watts and Margaret M. Watts, his wife.

NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  (Gov't Lot 4) in Section 1, T. 38 N., R. 1 East of W.M., less roads.

and that the same are owned in fee simple respectively by the above-named plaintiffs and their respective titles thereto are hereby quieted and set at rest against any lien or claim of lien asserted to have been made by the defendant, United States of America, arising out of the Act of March 18, 1926 (44 Stat 211-212).

It Is Further Ordered That by and under the provisions of said Act of March 18, 1926, and pursuant to actions taken under the authority thereof, the United States of America has and is entitled to a lien on the following described lands of the defendants Percy Hood and Grace Hood, his wife, more particularly described as Lots 5, 6, and 7, Section 6, Township 38 N. of Range 2, E. W. M. in Whatcom County, Washington, in the sum of \$399.40 as and for construction charges under said Act and the further sum of \$1,270.77 as and for operation and maintenance charges up to and including July 6, 1955, making a total of \$1,670.17, and that the said defendant, United States of



America is entitled to have the same foreclosed and the said real property sold and the proceeds used to pay and discharge said liens, together with interest from this date at the statutory rate of six per cent per annum.

It Is Ordered, Adjudged and Decreed that the above described real property of the said plaintiffs Percy Hood and Grace Hood, his wife, be sold to satisfy the said sum of \$1,670.17 under said liens, subject to such right of redemption as is provided by law and that the said sale shall be conducted in accordance with the law and the practice of this court by the United States Marshal for the Western District of Washington and that the time, place and manner of said sale shall be as this court may hereafter upon application of the defendant, United States of America, hereafter prescribe.

It Is Further Adjudged that no costs be recovered against any party to this cause, and the defendant, United States of America, shall pay the accruing costs of any sale which may be had, hereunder.

To all of which plaintiffs except and their exceptions are allowed.

To the disallowance of penalties and/or interest on the sums allowed herein as a lien on the subject properties, defendant United States of America excepts and its exceptions are allowed.

Plaintiffs Hood also except to all findings of fact and conclusions of law herein supporting the allowances by the court to defendant of any recovery

whatsoever against subject property and to the court's refusal to make and enter plaintiffs' proposed conclusions, and their exceptions are allowed.

Done in Open Court this May 7th, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and approved by:

/s/ F. N. CUSHMAN,

Asst. United States Attorney.

Approved as to form:

/s/ DONALD M. BUSHNELL.

[Endorsed]: Filed May 7, 1956.

Entered May 9, 1956.

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Come Now the plaintiffs, Percy Hood and Grace Hood, his wife, by its undersigned attorney, and move this court to set aside the provisions of the Judgment heretofore entered in this cause establishing a lien upon the lands of said plaintiffs, Percy Hood and Grace Hood, and providing for a foreclosure thereof, and to grant a new trial to said plaintiffs as to the matters and things involved in the said Judgment against them, or in the alterna-

tive to vacate that portion of the Judgment heretofore entered herein and to make and enter its Judgment denying any claim or lien of the Defendant against them or their said lands, and for the following reasons:

I.

That the said Judgments are contrary to law, in whole or in part by reasons of errors in law occurring at the trial, as follows:

(A) In that the court erred in making and entering its Conclusions of Law numbered III and V.

(B) In that the court erred as a matter of law in making and entering so much of its Conclusions of Law No. V as provides that any lien of the United States against the lands of these plaintiffs covers not only the construction charges but "also for operation and maintenance charges of \$1270.77 to July 6, 1955."

(C) In that the Court erred as a matter of law in refusing to make and enter the "Conclusions of Law Proposed by Percy Hood and Grace Hood," being lettered A, B, C, D, E, F, G, and H.

(D) In that the Court erred as a matter of law in refusing to make and enter a Finding of Fact, as requested by these plaintiffs, to the effect that

The Hoods were let into possession of the premises, without any other or separate contract or agreement pending the approval of

said deed and starting farming operations thereon on or about March 1st, 1926.

such request being a portion of the original Finding proposed by them numbered IX, and having followed No. IX as heretofore adopted and made by this court, when there was creditable evidence requiring such Finding and no substantial evidence contrary thereto.

## II.

These Plaintiffs state that were it not for the making of the foregoing errors of law Judgment would have resulted necessarily for these Plaintiffs in conformity to so much of the prayer of the Complaint as referred to their lands described therein.

Dated this 16th day of May, 1956.

/s/ DONALD M. BUSHNELL,  
Attorney for the Plaintiffs Percy Hood and Grace Hood.

Certificate of service attached.

[Endorsed]: Filed May 17, 1956.



[Title of District Court and Cause.]

MINUTE ORDER—JUNE 4, 1956

Present: Hon. John C. Bowen, Judge

Donald Bushnell for Percy Hood, et ux.

U. S. Atty. F. N. Cushman.

Pursuant to order of adjournment, Court convenes and hears the following matters:

Called, argued and denied and all pending motions are denied and it is so ordered. Exceptions are allowed Plaintiffs' counsel.

(Certified true copy.)

[Endorsed]: Filed June 4, 1956.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given this 2nd day of August, 1956, that Percy Hood and Grace Hood, his wife, hereby jointly and severally appeal to the United States Court of Appeals for the Ninth Circuit from that part of the "Judgment Quieting Title Against the Claims of the United States of America as to Certain Lands and Establishing and Foreclosing a Lien Against Other Lands" in favor of the United States of America, plaintiff, on its counterclaim which purports to establish and foreclose a lien against the lands of said appellants, Percy Hood and Grace Hood, the particular part so appealed from being the paragraph beginning "By and under the provisions of said Act of March 18, 1926 \* \* \*"

and the paragraph immediately following said paragraph.

/s/ DONALD M. BUSHNELL,  
Attorney for the Appellants.

[Endorsed]: Filed August 2, 1956.

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[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS  
TO BE RELIED UPON IN THIS APPEAL

Come Now, the appellants, Percy Hood and Grace Hood, his wife, and state that on their appeal herein they will rely upon the following points:

1. That the District Court erred in making its Conclusions of Law numbered III, IV and V and in refusing to make and adopt the Conclusions of Law Proposed by the Appellants, being designated therein A to H, inclusive, and in adjudging and decreeing that the United States has, and is entitled to, a lien upon the lands of the appellants described in the complaint under the Act of March 18, 1926, either for and on account of construction costs of the dike mentioned in said Act or for operation and maintenance thereof, and/or interest, or for both such charges, and in decreeing that such purported lien be foreclosed against such lands, because:

A. Under the facts as found by the District Court:

(1) Upon the preparation of the Memorandum of Sale of Alloted Land and the Indian Deed of Inherited Land and of the execution of the former by the Indian Agency Superintendent and these appellants, all on November 10, 1925, and the payment of the consideration for the purchase of the land by the appellants in cash and negotiable notes, and in view of the provisions of warranty of title contained in said deed these appellants became possessed of an equitable title under the doctrine of equitable conversion, or at least an equitable interest and right to acquire legal title, subject only to the right of the Secretary of the Interior to refuse to approve the sale provided for therein, which right, title or interest of the appellant was a property right not subject to any compulsory lien such as is asserted herein under said Act of March 18, 1926.

(2) That the formal approval to said Memorandum of Sale and to said Indian Deed, given on August 10, 1926, related back so as to make either or both of them effective as of the date of their execution, to wit, November 10, 1925; that the upon its ultimate delivery in 1928, after timely payment by the appellants of their said notes in full discharge of the consideration for said sale, the said Deed should be deemed as against the United States to have been delivered on the day of its date, November 10, 1925, prior to the enactment of the Act of March 18, 1926.

(3) That the rights of the appellants under said Memorandum of Sale and under said deed held in escrow under said Memorandum, they having fully performed their obligations thereunder, were property rights, and invulnerable to any lien under said Act of March 18, 1926, the appellants having never consented to such lien or signed any contract therefor; that the lien sought to be enforced by the judgment herein is involuntary, unilateral, dependent solely (in the absence of their consent) upon Congressional fiat, without foundation in law, and obnoxious to the Constitution of the United States as a denial of due process of law.

(4) That the United States is estopped, whether as to itself as an entity, or as agent for the Indian vendors named in said Memorandum of Sale and Indian Deed, from asserting its said claimed and purported lien against the lands of these appellants; that if there is a failure of a technical estoppel, and in any event, there was a contractual duty, at least implied if not expressed, in said Memorandum of Sale construed with said Indian Deed, and arising out the negotiations of its agents with the appellants resting upon the United States, and as a matter of good faith, to do nothing to contravene, violate or impair the rights of the appellants under said Memorandum of Sale and Indian Deed, or to nullify or impair the obligation of the Indian grantors in said deed to convey a good title to the appellants; that the imposition of the lien herein decreed would so impair the rights of the appellants



and impair, breach and nullify the warranties of title in said Deed.

(5) That notwithstanding the restriction in the patent to Mary Yah-him-a-loo as to alienation without the approval of the President, the title thereby granted to her, and which passed by descent to the Indian grantors in said deed, and to these appellants, was and is a title in fee simple; that as none of them consented to any lien under the Act of March 18, 1926, the said Act was ineffective to impose any lien, and the lien herein purported to be decreed, upon the lands of the appellants; that said lands, even if the title thereto were wholly in said grantors at the time of the enactment of said Act, were not—within the meaning of said Act—“Indian Lands” but rather “Lands in Private Ownership”; that the attempt to impose any lien under said Act on said lands (no consent having been given by said grantors or the appellants), was void and contrary to the rights of said parties under the due process clause of the Constitution.

(6) That the only liens (other than contractual liens not here involved) authorized or attempted to be created by the said Act of March 18, 1926, were those provided in Section 2 thereof and against Indian lands which had not yet been “patented”; that since the lands here involved had long since been patented to Mary Yah-him-a-loo, said Section 2 could not and did refer to such lands or create or purport to create any lien against them.

(7) That if said Act of March 18, 1926, created any lien against the lands herein involved, such lien came into existence only upon the making of the "Public Notice" under said Act, to wit, on August 19, 1930, and did not affect the title of the appellants thereto, which at the latest vested not later than the final delivery of the Indian Deed to the appellants in 1928.

(8) That even if there should be decreed to be a lien upon the lands of the appellants for their alleged share of the construction costs of the Lummi Dike, there was no lien in any event for operation and/or maintenance; that no authority was given in the Act of March 18, 1926 for the imposition of operation and maintenance costs; that the attempt to impose them upon appellants is without any warrant or basis whatsoever in law; if it be sought to justify the same upon any regulation purported to be made by the Secretary of the Interior or other executive agency of the United States, such regulation to such extent is without foundation and void.

/s/ DONALD M. BUSHNELL,

Attorney for the Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, and designation of counsel, I am transmitting herewith the following original documents and papers in the file dealing with the above cause as the record on appeal herein from that part of the Judgment Quieting Title Against the Claims of the United States of America as to Certain Lands and Establishing and Foreclosing a Lien Against Other Lands beginning “By and under the provisions of said act of March 18, 1926” and the paragraph immediately following said paragraph rendered May 7, 1956 to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Petition for Removal, including copy of original Complaint and Summons, filed June 26, 1953.
2. Notice of Removal, filed June 26, 1953.
4. Answer as to all Plaintiffs other than Percy Hood and Grace Hood, his wife, filed Nov. 12, 1953.

5. Answer as to Plaintiffs Percy Hood and Grace Hood, his wife, filed Nov. 12, 1953.

6. Counterclaim, filed Nov. 12, 1953.

9. Answer of Defendants Percy Hood and Grace Hood to Counterclaim of the United States, filed Jan. 28, 1955.

26. Court's Oral Opinion, filed Aug. 30, 1956.

15. Findings of Fact and Conclusions of Law, filed May 7, 1956.

17. Conclusions of Law Proposed by Percy Hood and Grace Hood, filed May 7, 1956.

16. Judgment quieting title against the claims of the United States of America as to certain lands and establishing and foreclosing a lien against other lands, filed May 7, 1956.

19. Motion for New Trial, filed May 17, 1956.

Certified copy of minute entered Order denying new trial, entered June 4, 1956.

21. Notice of Appeal, filed August 2, 1956.

22. Bond for Costs on Appeal, filed August 2, 1956.

23. Appellants' Statement of Points to be relied upon in this appeal, filed August 17, 1956.

24. Designation of Contents of Record on Appeal, filed August 17, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and



charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 4th day of September, 1956.

[Seal]                      MILLARD P. THOMAS,  
Clerk;

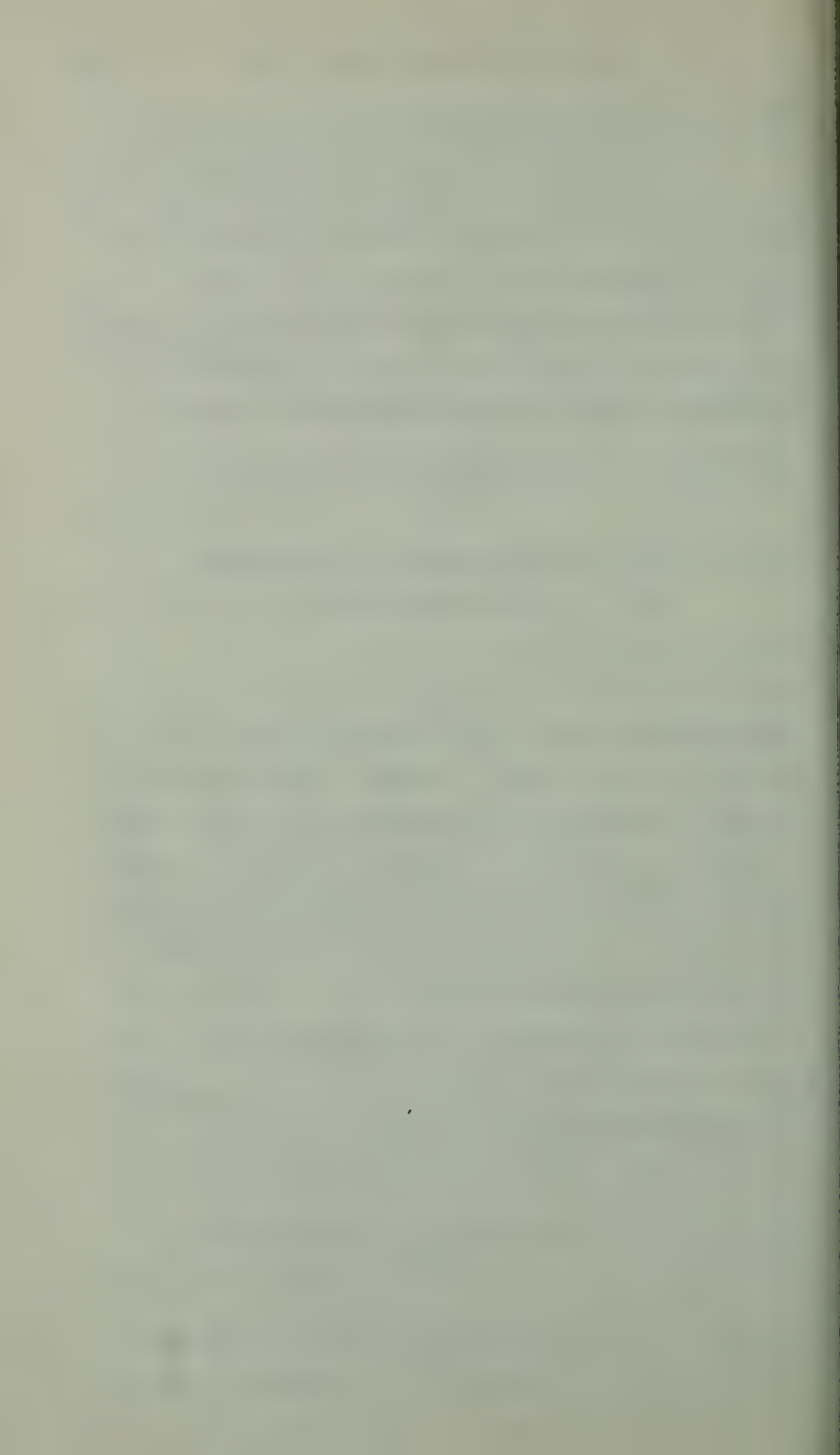
By /s/ MARJORIE J. EDQUIST,  
Deputy Clerk.

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[Endorsed]: No. 15267. United States Court of Appeals for the Ninth Circuit. Percy Hood and Grace Hood, his wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 6, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



No. 15267

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UNITED STATES COURT OF APPEALS

*For The Ninth Circuit*

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PERCY HOOD and GRACE HOOD, His Wife,  
*Appellants*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

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*Brief of Appellants*

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Appeal from the United States District Court for  
the Western District of Washington,  
Northern Division

FILED

DEC 10 1956

L. P. O'BRIEN, CLERK

Donald M. Bushnell,  
*Ferndale, Washington,*  
*Attorney for Appallants.*

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No. 15267

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UNITED STATES COURT OF APPEALS

For The Ninth Circuit

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PERCY HOOD and GRACE HOOD, His Wife,  
*Appellants*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

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*Brief of Appellants*

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Appeal from the United States District Court for  
the Western District of Washington,  
Northern Division

Donald M. Bushnell,  
*Ferndale, Washington,*  
*Attorney for Appallants.*

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## JURISDICTIONAL BASES.

This is an appeal from a decree of the United States District Court for the Western District of Washington entered upon a counter claim of the there defendant, the United States, appellee herein, against the appellants, Percy Hood and Grace Hood, his wife, foreclosing a claimed lien against certain land owned by them, and, in effect, denying the prayer of the complaint that their titles thereto be quieted against such claim of lien.

By its Act of March 18, 1926, 44 U. S. Stat. 211, hereinafter referred to as the "*Diking Act*" or "*the Act*" Congress authorized an appropriation for and construction of dikes for the declared purpose of "*reclaiming about 4000 acres of land*" in and adjacent to the Lummi Indian Reservation in Whatcom County, Washington. This Act purported to "*create*" ipso facto, liens against lands to be "*benefited*" which might be in "*Indian ownership*" and provided for and purported to require the obtaining of liens by contracts with owners of land in "*private ownership*", all in favor of, and to secure reimbursement to, the appellee for such construction costs. Such costs, were under the Act, to be "*equitably distributed*" to "*the lands*" according to the "*benefits*" to the respective tracts comprising such "*lands*", and the extent and details of such liens were to be set forth in a "*public notice*" to be given by the Secretary of the Interior.

The full test of the Act appears in Appendix I and II.

Owners of seven tracts of land within the confines of the Reservation, including appellants, joined in bringing this action against the United States in the Superior Court of the State of Washington for Whatcom County. Their complaint (Tr. 5-31) alleged that the "*ownership*" of each of the tracts was "*private*", and that no lien contract, affecting the lands of any of them had ever been executed but that notwithstanding such facts, the United States, by means of such "*public notice*" in 1930, and by other means, has continuously claimed to have such liens thereon, and prayed that their several titles be quieted against such claims.

Sovereign consent to such action was there pleaded, and is here asserted, to be found in 28 USC 2410 (a) providing that the United States

"may be named a party to a civil action or suit in any district court, including the District Court of the Territory of Alaska, or in any State court having jurisdiction of the subject matter, *to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or lien.*"

Since this statute is merely a "consent" statute (see *Wells v. Long*, 162 F. (2d) 842) jurisdiction of the subject matter must be found independently of it. All of the asserted liens were less than the \$3,000.00 minimum required for initial federal jurisdiction; therefore the action was filed in the state court. However after due service of process the appellee removed it



to the District Court below, under authority given by 28 USC 1444, which provides that "any action brought under section 2410 may be removed to the United States District Court" for the district in which the state court is located.

Those allegations of the complaint bearing on the manner by which the alleged liens were asserted and the titles of the several plaintiffs clouded were common to all of them. But as the nature or state of the ownership there were allegations distinctive to the land of appellants, the Hoods. Although all of the tracts were originally reservation lands, which had been anciently allotted to individual Lummis, those of the non-Hood plaintiffs, it was averred, had come by mesne conveyance into "private" (and non-Indian) "ownership" long prior to the passage of the Act.

This was not denied by appellee. Answering separately as to those plaintiffs (Tr. 38) the United States simply denied that it claimed any such lien, and that since consent to sue the sovereign was limited (so said its answer) to instances where a lien was being claimed, there was here no jurisdiction. But on that issue of fact the court below found for those plaintiffs, and by its decree quieted their titles. From that portion of the decree there has been no appeal.

As to appellant's land, however, the complaint charged that the United States claimed that it held an auto-

matic lien under the Act because the lands were in "Indian ownership" of record at its effective date. Ad-

mitting that while record title was then being held by divers Lummi Indians the complaint made various charges the effect of which, the appellants asserted, was to deny and obviate any lien claim. Among these, was the history of the acquisition of their titles. While these details are more appropriately developed later herein, suffice it now to say that essentially they charged that the United States itself, pursuant to law and its own regulations and as agents for the Indian owners (heirs of the original allottee) had four months prior to the enactment of the act procured the appellants to contract to purchase said lands under a "Memorandum of Sale" (Tr 28-30), and to pay (without right of withdrawal) in full therefore in cash and notes. The complaint pleaded that these facts (and others) caused the later delivery of the fulfillment deed which had been dated simultaneously with the "memorandum" to be deemed to relate back to its date of execution, and to have created in appellants an equitable title, and to have estopped the appellee from asserting the lien, and that appellants had such interest or title, or in any event the Indian heirs themselves had a fee title, both of which were guarded by the due process clause of the Constitution from any arbitrary and automatic lien such as the Act purported to effect. Other attacks on the claim of the lien were alleged.

Appellee separately answered these allegations (Tr.

39-45), admitting most of the factual statements, and that it claimed as valid the very lien which the complaint charged was wrongfully asserted. Appellee also filed and served upon appellants a counterclaim and summons thereon (Tr. 45-50), which, with appellants answer thereto (Tr. 50-59) raised the same issues as did the complaint and the last aforesaid separate answer thereto, and which alleged the sum due under the alleged lien to be \$1830.24, and prayed foreclosure of the lien to produce payment thereof. The decree appealed from is based on, and sustains, the counterclaim. The issues under it, being identical to and arising out of the same transactions as those in the complaint, were clearly ancillary to the original jurisdiction over the complaint. See Barron and Holtzoff, *Fed Prac., and Proc.* Vol. 1, Sec. 23.

By 28 USC 1291 this court is invested with jurisdiction to review "all decisions" of the district courts.

### STATEMENT OF THE CASE

Trial was had upon the pleadings outlined above, which as to the issues in this appeal, were upon those portions of the complaint relating to the lands of the Hoods, the separate answer thereto, the counterclaim against them and the answer thereto. Findings of fact were specially made which are reflected in the facts above stated. The slight extent to which appellants might except to them did not justify review here and they stand unchallenged on this appeal. From

them the Court made conclusions adverse to appellants, and the central question is whether, under these facts and pleadings any valid lien was created by the Lummi Diking Act. For Full text see appendix.

This act classifies the lands to be affected by the project as lands in "Indian ownership" and "private ownership", and purports to distribute the costs equitably to all the lands. As to the former, Section 2 of the Act provides that:

"The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such lands."

Section 3 would require repayment contracts from the owners of lands in private ownership.

The issues are thereby narrowed at the very outset. The only lien sought by or pleaded in the counterclaim (Tr 47-49) or adjudged by the decree appealed from, is the automatic, unilateral and arbitrary one which the Act attempts to impose, and to impose only, on lands in "Indian ownership." There is no question of a contractual lien, and to sustain such a statutory lien the United States must establish that at the time the liens created by the Act (if any were) became effective the lands were in "Indian ownership"; more than that, that the lands were not then "in private ownership" because as



we shall show later the two terms are not just the converse of each other.

So then, the following subsidiary questions arise, all of them raised by the pleadings, and reflected in the findings, proposed conclusions and motion for new trial, namely—

1. At the time of passage of the Act had the process of acquisition of title by the appellants gone so far

(a) that as between them and appellee their interests, under the doctrine of equitable conversion had become equivalent to legal title.

(b) that they had acquired any property right or interest in or in respect to said land, and with respect to which the imposition of such a lien would offend any constitutional rights.

2. Even if any such title or interest of the appellants were to be eliminated from consideration, and the title deemed for the purposes of this case to be in the Indian heirs (grantors to the Hoods), with their right of alienation dependent upon the consent of the United States, was the nature of their title such as to be from such a lien protected by the requirements of due process or otherwise constitutionally immune from such a lien.

3. Did the approval of the "Memorandum of Sale" by the Secretary of the Interior some months after the passage of the Act, and of the escrowed deed relate back to the dates thereof, well prior to the Act, as against the United States and its claim of lien.

~~matic lien under the Act because the lands were in "Indian ownership" of record at its effective date. Ad-~~

4. Was the United States estopped by its solicitation of the sale to the Hoods, or by any of its transactions with them respecting this land prior to the Act, or, by such matters in any manner, barred from claiming that it retained as against them arbitrary legislative power to impose the lien and thus alter the effect of the contract of sale and force a breach of the covenants respecting good title.

5. Does the proper interpretation of Section 2 of the Diking Act limit the classification of lands "in Indian ownership" to those not yet "patented" by the United States, and hence exclude the Hood lands, which had long since been patented.

6. Even if the claimed lien for construction charges for the dike be sustained, did the lien embrace charges for operation and maintenance?

### SPECIFICATION OF ERRORS

These questions are reflected in the following specifications in which, we respectfully urge, the trial court erred:

1. In adopting its Conclusion III (Tr. 74) holding that the lands of the Hoods is Indian land within the meaning of the Diking Act.

2. In adopting its Conclusion V. (Tr. 74) that notwithstanding that the "Memorandum of Sale" was made by the Hoods and the Indian agent in November, 1925, four months prior to the Act, and the deposit with the Indian agent of the full consideration, and the subsequent acts done in completing the transaction

as shown in Findings VII, VIII, IX and X Congress had the power to subject the land to the involuntary lien created by Sec. 2 of the Act, and that such lien covers the operation and maintenance charges through successive years as well as construction costs.

3. In refusing to conclude (Tr. 76) that equitable title to the lands of the Hoods passed to them upon the execution of the "Memorandum of Sale" and payment of the purchase price in cash and notes, under the doctrine of equitable conversion or otherwise, and that such title could not be, and was not impaired by the Diking Act.

4. In refusing to conclude (Tr. 76) that the approval of the Secretary of Interior to said "Memorandum of Sale" and the "Indian Deed of Inherited Land" to the Hoods, given subsequent to the Act related back to the dates they bore, Nov. 10, 1925, prior to the Act.

5. In refusing to hold that (Tr. 77) the quality of the title of Mary Yahimaloo, the original patentee of the Hood land, and of her heirs, was in fee simple despite the restriction on their rights of alienation.

6. In refusing to hold that (Tr. 77) the title of the Indian grantors to the lands which they sold to the Hoods was such that the said lands was not "Indian Lands" but "Lands in Private Ownership" within the meaning of the Act.

7. In refusing to hold (Tr. 77) that only liens (other than contractual liens) authorized or created by the

Act were those provided in Section 2 thereof against Indian lands which had not yet been "patented", and could not and did not affect the Hood tract, the same having been "patented" long prior thereto.

8. In refusing to hold that (Tr. 77) the title of the Indian heirs, to the lands conveyed to the Hoods, being a fee title, could not constitutionally be subjected to the involuntary lien sought by the Act in that in so doing due process would be ignored, and if construed to intend such a result would be unconstitutional and void.

9. In refusing to hold (Tr. 78) that in the proceedings relating to the sale of the property to the Hoods, the United States was acting as agent for the then Indian owners, and in its actions throughout such proceedings, and particularly in procuring the Hoods to sign the "Memorandum of Sale" and at the same time submitting to them, and accomplishing the execution of the Indian deed to the Hoods containing a warranty of title, the United States was estopped to promote and enforce the lien of the Act, the effect of which would be to force a violation of the warranties as to title in said instruments, or that in any event or was otherwise equitably barred from so doing.

10. In holding (Tr. 75) that the lien, in any event, covered operation and maintenance as well as construction charges and in refusing to hold (Tr. 85, par.



B) that the former were not covered.

11. In decreeing that appellant's lands were subject to the lien, and failing to quiet their title.

## ARGUMENT AND AUTHORITY

### PRELIMINARY MATTER AND SUMMARY

Consideration of the issues posed by the foregoing questions involves inquiry into the nature of the relationship of the United States to the Lummi Indians, and particularly to the Indian "owners" of the lands herein involved and the quality of their ownership, and the kind and extent of the rights and duties of the United States to them, and the effect thereon of the Diking Act of March 18, 1926.

The historical background and pertinent facts are fully developed in the pleadings and set forth in the Findings of Fact (Tr. 62-73), those particularly referring to the lands involved in that part of the original case here appealed being Findings VII to XII, inclusive (Tr. 68-73)\*1. Essentially they show that by treaty of January 22, 1855 between the United States and the Lummis and other tribes what is now known as the Lummi Reservation was set aside to that tribe, and that under powers contained therein President Arthur on December 31, 1884, pursuant to a previous allotment gave and granted the tract here involved to Mary Yahimalco "to have and to hold to her and her heirs forever", subject to the same terms contained in a previous treaty with the Omaha Indians,

\*1 For full text see appendix, v. - ix.

which among others restrained the grantee and her heirs from alienating the same except on certain conditions. It was conceded that Congress had later legislated to permit alienation upon request of the owners with the consent of the Executive branch, and set up procedures governing the giving of such consent under which it in effect acted as agent for the owners in procuring sales by bids and negotiations, (Findings VII, Tr. 68-69, Appendix V.)

Sometime prior to the fall of 1925, such procedure had been instituted at the request of numerous heirs of Mary Ya-him-aloo, the then "owners" of the land and when no bids were forthcoming, the Commissioner of Indian affairs suggested to Mr. Hood that he make an offer, which he did, resulting in the execution of the "Memorandum of Sale" made and dated November -10, 1925 (for full text see Tr. 28 and see also Findings VII., app v. Tr. 69). There is nothing tentative about this instrument. It reflects a fully executed agreement. It recites that the Hoods had "purchased" the property for \$10,100.00 and had paid one-fourth (\$2525.00) thereof in cash and executed four equal promissory notes for the remainder, payable consecutively and annually, and it then "witnesseth" unconditionally that "upon payment in full . . . then in such case a deed duly executed by said heir . . . and approved by the Secretary of the Interior, shall be delivered to (the

Hoods) conveying said land to them and their heirs pursuant to law." Then followed provisions giving said Secretary the option (but not requiring its exercise) in the event of non-payment of forfeiting the contract and retaining 25 per cent of the total price as damages. It further provided that "the deed" so mentioned should be retained in escrow by the Commissioner until payment in full and then be delivered to the purchaser.

This was signed by W. F. Dickens, Superintendent, and the Hoods, and concededly was on a form prepared by the Indian Bureau. It was stamped — "approved" August 10, 1926 by the Assistant Secretary at Washington. Coincidentally, on a Bureau form there was prepared by its officials, (Finding VIII, Tr 70, and for full text see Tr. 31) the "Indian Deed of Inherited Land", which thereafter, and upon final payment (prior to the maturity of the notes) was delivered to the Hoods and through which their legal title is derived. It recites the names of all of said heirs, as parties of the first part, and the Hoods as parties of the second part, and then:

"Witnesseth, That said parties of the first part for and in consideration of the sum of \$10,-100.00 in hand paid . . do hereby grant, bargain, sell and convey unto said party of the second part . . . (the premises involved herein) . . And the parties of the first part, for themselves and their heirs, executors and administrators, do here-

by covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they will forever warrant and defend said premises against the claims of all persons, claiming or to claim, by, through or under them only".

This was executed and acknowledged by all 23 adult heirs at various times on or before January 16, 1926. It was signed also by "Walter F. Dickens, Legal guardian for" four named minors, and acknowledged by him as such guardian on June 28, 1926, and was also approved (Finding IX, Tr. 72) on August 10, 1926 by the Secretary (see also app. vii.)

The interest of the minors gave title concern. Therefore said agent, Dickens, procured himself to be appointed their Guardian in the state probate court, and in such probate cause obtained authority to and did sell their interests to Percy Hood, the consideration being the product of the ratio of their interest to the whole applied to the total purchase price, and which was taken out of it, at least the Hoods paid no separate additional consideration, (Finding IX, Tr. 71-72). The return of sale by said Guardian in the probate court referred to the sale as having been made March 8, 1926 but did not specify any date but the order of confirmation was entered on June 4, 1926. Thereafter said "memorandum" and "deed" were sent to Washington and approved as above stated. There can be no doubt that the probate procedures were the cause



of the delay in the formal approval of these instruments by the Secretary.

In summary, the arguments on these facts are:

1. That the title of the Indian heirs was in fee simple and their rights, as absolute owners, to be distinguished from Indians holding under "Trust patents."

2. That the lands here involved were either free from the automatic lien of the Act under its express terms or such attempted lien was unconstitutional or void.

3. Separately from the constitutional question, the lien did not arise because the effective dates of the memorandum of sale and the Indian deed to the Hoods were their recited dates of November 10, 1925 prior to the passage of the Act, because:

A. The memorandum, upon its signing, constituted a presently existing executory contract; B. the Hoods acquired an equitable title to the property under the doctrine of equitable conversion on said date; C. under the doctrine of relation back, the effective date was the recited date;

4. At the very least, the appellants had vested property rights prior to the Act which the purported lien under the Act would impair contrary to due process.  
5. In any event there is no lien under the Act for operation and maintenance. That all these points are reflected in the specifications of errors is obvious.

## THE INDIAN LAND WAS IN FEE SIMPLE

This has long been decided by both the federal and state courts in this jurisdiction. The record source is the patent to Mary Yahimaloo set out in full as an exhibit to the complaint (Tr. 25) and incorporated by reference in Finding VII (Tr. 68), and dated December 31, 1885. It was given pursuant to the Treaty made January 22, 1855 with the Lummi and other Indian tribes between Governor and Indian Agent Isaac Stevens and ratified by the Senate on March 8, 1859, and found in 12 U. S. Stat. at Large, 927. The provisions pertinent to the title question, as shown by the recitals in the patent, in turn were incorporated by reference from the Treaty with the Omahas, (10 U. S. Stat. at Large 1044) and set forth in the opinion in *Bird v. Winyer*, 24 Wash. 269, 74 Pac. 178.

In view of the unanimity and wealth of opinion on this point it does not seem appropriate to burden this brief with the somewhat lengthy text of that treaty. Suffice it to say that the Lummi Treaty gave the President (as the patent itself in *haec verba* recites) authority

“at his discretion, to cause the whole or any portion of the (reservation) . . . to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms as are provided in the Sixth Article of the Treaty with the Omahas”

and the latter treaty further authorized the President

after any such permanent location had been made to "issue a patent to such person or family . . ." conditioned on certain terms against alienation, and providing further, in substance that, if after the issuance of the patent the patentee neglected or refused to occupy and till such lands, and "rove from place to place" the President might cancel the patent. The patent then reads: "The U. S. has given and granted and . . . does give and grant unto . . . Mary Yahimaloo and her heirs . . . (said land). To have and to hold . . . forever".

So in *Bird v. Winyer*, while holding that this "was simply a defeasible title" the court further held (somewhat inconsistently, we think) that the patentee received only the right to possession and occupancy. But four years later, the same court in *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, held that this was obiter, and followed the decision of Judge Hanford in *Ross v. Eells* 56 Fed. 855 and *United States v. Kopp*, 110 Fed. 160 in holding that neither the restrictions on alienation or the provisions for cancellation deprived the patentee's title of the quality of an estate in fee simple, citing Kent's Commentaries to classify it as a "qualified, base or determinable fee" . . . which may continue forever." and which make it inheritable and a fee. This view was confirmed in *Prichard v. Jacobs*, 46 Wash. 562\*1, and on appeal therefrom in *Jacobs v. Prichard*, 232, U.S. 200, 56 L.Ed. 405, 32 S. Ct. 287, and again in "*In Re Little Joe's Estate*," 165 Wash. 628, 5 P. (2d) 995. While the earlier cases were not based on the Lummi Treaty, the opinions disclose that the terms of the treaties therein involved were as to this issue identical and in the last named

\*1 90 Pac. 922.

case it was the Lummi Treaty (though with one of the other tribes) that was passed upon. Clearly such is the long established rule in Washington.

Under other similar patents and treaties the United States Supreme Court has ruled likewise; *Libby v. Clark*, 118 U.S. 250, 6 S. Ct. 1045, 30 L. Ed. 133 and *Lykins v. McGrath*, 184 U. S. 169, 46 L. Ed. 485, 22 S. Ct. 450.

We cannot overemphasize the basic importance of this holding to this appeal, as will appear *infra*; also because without an awareness of the distinction between this fee simple ownership under these local treaties as compared with the tenure under some of the later arrangements it is easy to be led astray as to the extent of the government's power over what is sometimes loosely called "Indian Lands", and in the Diking Act, as we submit, in the use of the phrase "Indian ownership."

As is said in 27 Am. Jur. 547 (Indians, Sec. 9)

"Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them. In that year, however, Congress, by Statutes declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of the legislative power over them, instead of by treaty."

But the same text (p. 548, Sec. 10) goes on to say:

"A treaty with an Indian tribe has the same force and effect as a treaty with a foreign na-



tion. It becomes a part of the law of the land . . . The Federal Government is bound to carry out the obligations of such treaties in the same manner as an individual would be bound, and *Congress cannot impair rights vested under these treaties.*"

And on page 551 (Sec. 15) the same text continues:

*"The protection guaranteed by the constitution of the United States to the ownership of private property extends to individual property held by an Indian; his private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status,"*

citing numerous cases. It seems to us that these propositions are self-evident and need no further substantiation.

But, as before suggested, caution does need to be exercised to distinguish decisions based upon rights acquired under the policies consequent to the change noted in 1871 from those private rights under prior treaties. This need is heightened by the use of similar terms in both the prior and subsequent arrangements with Indians. Particularly is this true of "allotments". There is no doubt, 27 Am. Jur. 555, that the fee of the lands in the original occupancy of the Indian tribes has from the formation of its government been vested in the United States, in trust for the Indians, and that when reservations were created, the rights the tribes acquired thereto were merely the perpetual right of occupancy, except as modified by treaty, as in this in-

stance by the treaty right of the President to "allot" parcels in fee. There can be no question but that from the very necessity of the case, and as "sanctioned" by long-continued "legislation" the United States has exercised what is called "plenary" power over Indians generally, and over lands yet tribal.

Under this power, and as a political power not to be restrained by the judiciary, but exercised solely by Congress, "allotment laws were passed, commonly authorizing the assignment of particular tracts to individual tribal members, for a term of years but continuing to reserve the fee title in the United States in trust for the allottee, during which time it was inalienable. It has been held that thereunder Congress retained jurisdiction and control over such lands even to vary, even enlarge, the period of inalienability. These are referred to as "trust patents." In its brief to the trial court below, the United States recognized the distinction between the status, and attendant rights, of such "allotments" and those under fee simple grants.

Because the circumstances of the particular cases passing on the plenary power of such trust patents or allotment in no way brought into view the fee simple patents there are expressions in them tending to broad generalizations as to the extent of the plenary power over allotments. Perhaps the largest extent of the exercise of such powers is reflected in *Cherokee Nations v. Hitchcock*, 187 U.S. 294, 47 L. Ed. 183, 23 S Ct. 115, but the lands there involved were limited to "tribal lands", as the court was quick to note.

Although only a district court (of Washington) case *Eastman v. U. S.* 28 F. Suppl. 808, illustrates what we have said. The court there enjoined the Indian Bureau from enforcing its attempts by regulations to restrict the manner of cutting and sale from Indian allotments, holding that the right to cut timber is an incident of ownership and "*any act which excludes the allottee from the full enjoyment of the timber is an interference with the right of ownership.*" The confusion noted above between fee holdings and trust patents seems there to be involved, for the court said:

"Certain it is . . . that the Government under the supervisory power it may possess, *while it is holding the naked legal title in trust for the Indians* cannot deprive them of the full use of the timber upon the land, absent a specific statutory authorization, or reservation of powers in the certificate of allotment"; but also went on to say:

"Granted that the Secretary might refuse his consent to an improvident sale by an individual allottee, there is no warrant in this section (of the particular statute which was claimed to justify the regulations) for a policy of timber conservation, *which no matter how laudable and socially beneficial, does in fact diminish an Indian Allottee's full enjoyment of his fee*, as a matter not limited by allotment or by law. The only limitation in the allotment relates to alienation."

Here the court in the same breath calls the allottee's holdings a "fee" and contradictorily says the naked legal title is "in trust". It implies (by way of dictum) that "a specific statutory authorization" might have permitted the regulation while title was under such

trust. If in the second quoted portion above it also meant to imply that a statute could likewise impair the fee, we submit that the court must have overlooked the distinction. In short, the court came to the right result by wrong reasoning, in that it implied there was plenary power over trust allotment but that either a reservation of power in the allotment certificate or an act of Congress was required to authorize its application and since neither was shown to exist the attempted exercise was void, whereas it should have said that since there was a fee, (and as it did say, a fee was invulnerable) no such power was, or could have been, given.

In our own search we have found no decisions extending so far as to subject the rights of fee patentees to any such plenary power nor to contradict the rule above stated that these are no more subject to impairment than the rights of other fee owners. In short, fee ownership is fee ownership, whether held by an Indian or anyone else, and it seems that in these days of sensitiveness to discrimination with respect to civil rights that the proposition must be deemed elementary.

THE LANDS HERE INVOLVED WERE EITHER  
FREE FROM THE AUTOMATIC LIEN OF THE  
ACT UNDER ITS EXPRESS TERMS OR  
SUCH ATTEMPTED LIEN WAS UNCONSTITUTIONAL AND VOID.

Under the Act there are only two methods by which



a lien could arise; (1) either under a contract signed by an owner of "land in private ownership"—which would be voluntary; or (2) involuntarily, ipso facto the Act, and only upon "lands in Indian ownership." Thus, if there is neither a contract and the land in question is privately owned, there can be no lien.

There was here no contract, whether by the Hoods or by the Indian heirs, either pleaded or shown. By its counterclaim the United States rests its case on the theory that the lands were in Indian ownership. It does not say so in express terms but that is the only possible purport of their allegations (Tr. 47-48) that the "restricted patent left the underlying fee in the United States", and that "at the time of the effective operation of the memorandum of sale and the deed to the Hoods the land in question was subject to the provisions of the Act.

Let us assume, but only for the sake of the present argument (because we strenuously contend to the contrary *infra* this brief) that the Hoods had no right of property of any kind at the date when the Act became operative. Title then must certainly have been in the Yahimaloo heirs. When we thus test the appellee's position we find it in a dilemma which we believe insurmountable.

The United States then must in order to sustain its claimed lien (1) either persuade us that the title of the heirs was not in fee simple and thus deny the authorities cited in the foregoing section of this brief

and that "fee simple" title is something else than "private ownership", or (2) that if it does mean what it has always meant, and the heirs were private owners, that because they were Indians their property is subject to completely arbitrary control by Congress and that due process as to such an Indian owner is purely ephemeral. We have already disposed of the first horn. That the second is impossible, and contrary to the safeguards of the Fifth Amendment is the thesis of this section of the brief.

But even before we reach the constitutional dilemma the appellee has a further impediment to meet. The very sentence of Section 2 which "*creates a lien*" against Indian lands, goes on to provide that such lien "*shall be recited in any patent issued therefore*". In this case the patent had been issued some 40 years or more when the Act was passed. The United States could not thereafter issue a patent on the land. It had no title to grant by patent. The fee was in Yahimaloo heirs.

It is fair to assume that this Act was drawn by the Indian Bureau itself, certainly it is inconceivable that it could have passed Congress without its knowledge and participation since obviously the construction work was to be done by it and the Secretary of the Interior was to administer it. That being so, we may properly assume that the words of the text were used advisedly. It follows that "Indian lands" as used in the Act could not include lands already patented. This,

of course, is perfectly consistent with the necessary consequence therefrom; namely, that patented lands owned in fee by Indians are just as much within the meaning of the Act itself "private property" as lands owned by white persons. It is significant that in the Act there is no distinction based upon the race or ownership, except that implied by the word "Indian". We must assume that no racial discrimination was intended, and that *if an Indian privately owned land* he was entitled to the same treatment as a white owner.

There is no necessary showing that such an interpretation leaves Section 2 with nothing to operate on and meaningless. For aught that appears there might have been unpatented land within the Lummi Reservation, that is to say, tribal land, as to which the United States retained plenary power, by which to impose the lien. Thus by the very language of the Act, patented lands cannot be in "Indian ownership", and are therefore not subject to the lien.

Consider now the second horn of the dilemma. If "Indian lands" embrace such fee simple titles as the Yahimaloo heirs owned how can the Act survive constitutional attack? We have said, and we repeat, under the authorities in the previous section of this brief, the private rights of Indians are fully as sacred constitutionally as those of any other person. That being so, where does the United States find due process in the attempted imposition of this lien?

We here note *U. S. v. Eastman*, *supra* and urge the comment made thereunder.

We do not stop here to examine the question, although we doubt whether the United States has such power over land within the reservation as would, against private owners therein, give it the power (even if properly exercised with regard to due process) to impose improvement liens. It is sufficient here to say that if such power did and does exist there is clearly no constitutional exercise of it shown in the Act.

Due process requires notice and the opportunity to be heard. With respect to such improvements as drainage and reclamation the rule is:

“it is essential that before a special tax or assessment can become a fixed or permanent charge on the property of an individual, due process of law requires that he must have notice of it, and some opportunity to contest its validity and amount. When an improvement district is not created by the legislature, and there has been no legislative determination that the property included in the district will be benefited, it is unquestionable that property owners must have notice and an opportunity to be heard on the question of benefits, but it is equally true that such notice and opportunity to be heard are not essential when the legislature itself has determined what property can be benefited or has laid down fixed rules by which the benefits may be determined”, 16 A. CJS 1042.

And in 48 Am. Jur. 693, it is said:

“That where the legislature does not of itself act in determining an improvement district or



area or in making a special or local assessment, but delegates the power to do the same to some subordinary body, due process of law requires that at some state of the proceedings before the assessment becomes irrevocably fixed the property owner shall have opportunity to be heard, of which he must have notice. Under this rule it matters not, upon the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity is tested, not by what has been done under it but what may, by its authority, be done.

The Act clearly fails to meet these tests. The area is not defined. The mere statement that its purpose is to reclaim "approximately 4,000 acres within and adjacent to the Lummi Reservation" is not notice of what the exact boundaries are. Apparently (for the Act does not itself otherwise specify) this important matter is left to the uncontrolled discretion of the Secretary of the Interior. Further the Act clearly contemplates a variation in assessment; it directs the Secretary equitably to distribute the total cost "in accordance with the benefits received". Thus any property owner, even without his knowledge, by decision—whether correct or not—of the Secretary, may have his land included in the district so long as it is "in or adjacent" to the Reservation, and once included has no voice, even of protest, as to ratio of costs may be imposed upon it.

So clear is it that due process is there infringed that we deem it unnecessary to examine cases in detail.

It has been said many times by the courts that the views of executive agencies of the United States, and this is particularly true of Indian affairs, are persuasive as to the existence and extent of rights claimed to be given by legislation. Here there is overwhelming evidence in the record that the Bureau itself never believed the Act was valid to impose the liens, ipso facto the law, upon lands held under such restricted fee patents as was given Mary Yahimaloo. Finding X, (Tr. 72) \* states that the Secretary, in making his "Schedule of Charges" classified the lands as "white" and "Indian" and included the Hood land under his name as "white" and further repeatedly solicited the Hoods to execute a lien contract which they did not do. It is true that this particular item might be ascribed simply to a desire to avoid litigation but that cannot explain the further portion of the finding that contracts were asked of Indian owners of 61 tracts within the diking project held under such fee patents and obtained from 48 of them. If the liens, ipso facto, were good, why such expenditure of time and effort to obtain contractual sanction for them?

One may hazard the guess that in the preparation of the Act by the Department of the Interior, whether by mental inertia because the allotments in so many of the reservation lands they deal with are "trust allotments", that the basic fee quality of the titles involved in the Lummi Reservation was overlooked, and that the effort to obtain private contracts was made

\* See Appendix viii. - ix.

to bridge the gap. It would seem that the counterclaim likewise reflects the same fatal error. It refers to the "underlying fee" being held in trust by the United States (Tr. 47); which under the authorities is not fact.

We submit that the dilemma cannot be resolved; that no lien exists because there is no contract and no constitutional right, even against the heirs to impose it, and that this issue alone may determine the case and compel reversal.

THE EFFECTIVE DATES OF THE MEMORANDUM OF SALE AND THE INDIAN DEED TO THE HOODS WERE THE RECITED DATE OF NOVEMBER 10, 1925.

A.—THE MEMORANDUM UPON ITS SIGNING CONSTITUTED A PRESENTLY EXISTING EXECUTORY CONTRACT.

At the outset, we take it that it is not to be denied that the two documents, the memorandum of sale and the deed, are to be construed together. They relate to the same objective, and involved the three parties concerned in the ultimate transaction, namely, the Indian heirs, the United States acting by and through its Indian Bureau personnel, and the Hoods. They were prepared at the same time, by the same persons and bear the same date; they are connected by internal evidence; that is, the reference in the memorandum to the execution of the deed and the arrangements for its escrow and delivery.

For text of memorandum see app ii.

But when we examine into the two documents we find that in truth they are compounded with the law and the regulations of the Interior Department to spell out the actual agreement and to reveal the legal relations of the parties.

The "memorandum" itself is suggestive of an ordinary contract for the sale of real estate. It clearly refers to the "sale" of a described property—a designated Lummi "allotment", and recites the purchase price and its form: cash and notes— and the terms of subsequent payment. It names the purchasers, and is signed by them. In return for the payment it assures the purchaser of a "conveyance" and fulfillment deed which is to be escrowed, and delivery thereof is promised when final payment is made. It provides, as against the purchasers, and if they default, the alternative sanctions of forfeiture of the cash already paid on the one hand and (while not in express terms, yet clearly by implication) authorizes collection of the notes on the other.

But in other respects it differs from such a contract. While the latter uses such typical language as "the seller *contracts to sell* and the purchaser *contracts to buy*" and that the purchaser "*shall pay*" the price and the seller "*shall execute and deliver a proper deed*" this "memorandum" uses the past tense and the active voice; it recites that the purchasers (the Hoods) "*having purchased*" the allotment, thus indicating an accomplished transaction, and "*having made payment*"



in cash and notes, rather than directly obligating the *vendor* to give deed, it provides that "a deed duly executed by the heirs . . . *shall be delivered* to (the Hoods) conveying the land to them and their heirs pursuant to law." It also differs (1) in that the names of the vendors are not mentioned directly; (2) nor is it signed by them; (3) nor does it give them the right to exercise the alternative sanctions in the event of default in payment of collecting on the notes or terminating the contract and forfeiting the previous payments; but rather it is signed by W. F. Dickens, "Superintendent and Disbursing Agent", and the right to exercise such sanctions is given to the Secretary of the Interior "for the use of the heirs."

Since the escrow provisions tie in the deed, the recital of the names of the grantors therein does supply the names of the vendors. Through it also is imported into the agreement the covenants therein specifically obligating the heirs individually

*"forever to warrant and defend the said premises against the claims of all persons, claiming or to claim by, through or under them only."*

Except for the provisions that the notes shall be payable to "the superintendent" there is nothing in either instrument to indicate his status, or to what effect he signed the memorandum. As to the Secretary of the Interior, it is provided that if the Hoods should pay the notes, the deed which as above stated "shall be delivered" to them shall "be approved" by the Secretary and, as indicated above, the vendors' remedies

upon default, are to be exercised by that officer, "as provided by law". And the United States is also involved in the provisions making the Commissioner of Indian Affairs the escrowee of the deed.

These references to "the law" and the officers of the United States make it plain that the provisions of law are to be imported into the agreement.

Finding VII (Tr. 68-69), which was not objected by appellee, establishes that the Hoods transactions conformed to the ~~"legislation and regulations of the Bureau of Indian Affairs providing for the release of such restrictions (upon alienation" and~~

*"legislation and regulation of the Bureau of Indian Affairs providing for the release of such restrictions (upon alienation) and at the request of the heirs and after formal invitation to bid had brought no offers, . . . Percy Hood made an offer, which was incorporated into . . . the memorandum of sale."*

So the picture emerges. The Indians had fee title. They wanted to sell. They could not do so without the approval of the Secretary. Obviously as the condition of his approval, the law and regulations put the negotiations for sale into the hands of the Secretary and his subordinates in the Indian Bureau. As will be brought out later the courts have consistently held the only purpose of executive approval for such sales was to protect the Indian owners from improvident or unwise sales. The regulations do in fact provide for appraisals. Obviously also, the procedures required "requests" from the heirs, and formal invitations to

bid, both of which were done and given, until the Commissioner himself "suggested" (in effect solicited) a bid from Mr. Hood. Incidentally the correspondence file in the Indian office supplied the evidence for that finding.

All this meant that, in effect, the United States by and through its proper officers were constituted agents by the heirs to effect a sale of land. That the relationship might also be that of a guardian is immaterial. Agency in the broad sense consists of acting for or in behalf of another. The sale was of Indian owned property for "the use of" the owners. Everything involved necessary to effectuate for or in behalf of the vendors was done by Indian Bureau officers. By the Findings all that was done was authorized, if not demanded, by law.

The following legal results thus necessarily proceed from these transactions; as of November 10, 1925 upon execution of the memorandum:

1. The Indian heirs were obligated as principals to perform what they had requested their agent, the United States to promise; namely, to execute and deliver in escrow the deed then prepared and coincidentally dated and thus to warrant the title to the Hoods against any claim arising by or through them.

2. The United States:

- (a) both under its agency duty to the heirs and its contractual duty to the Hoods, was ob-

ligated to procure (at least use its best efforts to procure) the formal execution of the deed and the to hold it in escrow pending payment, and by its said Secretary formally to approve both it and the memorandum if in accordance with law it should do so. (In this connection while the memorandum did not in terms provide for separate approval of it, the Findings show it was approved and we are compelled in infer—and indeed the regulations so provided—that such approval was required).

(b) under its agency duty to the heirs to collect or at least receive payment for the notes, or if default occurred to exercise the sanctions thereunder applicable.

(c) under its contractual duty to the Hoods, to deliver the deed when and if payment of the notes was made.

(d) for both parties, as a matter of law inherent in every contract, to exercise good faith to each of the other parties.

Can there be any doubt that these relations arose immediately upon the signing of the memorandum and the delivery of the \$2525.00 and notes for \$7575.00? It will be suggested, no doubt, that there was nothing binding upon the parties until and unless the deed and memorandum were "approved"; also, that since the record shows there were minor heirs until they were bound by proper state court guardianship proceedings there could be no contract binding upon the others.



But that proposition is not sound. Since both approval and the minors guardianship proceedings were finally accomplished, and since all of the proceedings were found to accord with the law and regulations, we must assume that the United States had provided (as indeed it did) for the exigencies of minor rights. In the very nature of things, such rights were inevitably to be encountered in the conveyance of heirship titles. In short any practical scheme for such sales must take them into account. We must assume that there was a proper machinery for the commitment as to them and that it was followed, and that the subsequent formal guardianship proceedings were either required consequences thereof or done, as something additional to the regulations to satisfy the purchasers as to their title.

Since the department regulations are subject to judicial notice we may point out, that those applicable to such sales were brought to the attention of the court below and are to be found in Chapt. I, Title 25, Code of Federal Regulations, pages 321-323. From these we quote:

Sec. 214.18. PETITION TO SELL INHERITED LANDS. (a) if the petition is made by the heirs of a decedent, it shall set forth every material fact necessary to show full title in the petitioners, on Form 5-110, and shall be signed by all the adult heirs on their own behalf, by the guardian of a minor heir who has such guardian and by the

Superintendent or other officer in charge of the agency or school on behalf of any orphan heirs”.

Since it cannot be assumed that these regulations and laws are mere idle words and empty gestures we must conclude that the agency contract and relationship above described bound, and under the plenary power of the United States incidental to its duty of passing upon approval did bind, all of the heirs, including the minors, to such sale as might ensue under the proceedings initiated by their petition. No heir then had the right, either as against the common agent, the United States, or against the rights of the other heirs, to withdraw, and after the memorandum had been signed had no such right as against the Hoods, and correlatively each had the right to rely on the further participation of each of the others.

Could the Hoods have withdrawn? Obviously not, except by a breach subjecting them either to suit on their notes or forfeiture. Assuming the United States had given sovereign consent to such an action, on what basis of the common law of contracts could the Hoods successfully have sued to recover their deposit if they simply wished to get out from under the deal? So long as the United States and the Indian heirs went forward in good faith to perform their parts of the obligation there could be no breach, and the existence of such a breach, it is elemental law, would be the sole foundation for such withdrawal.

What has just been said also disposes of any con-

tention that may be made, and which seems to be the foundation of the appellee's position that until the "approval" of the Secretary there was no binding contract. Such a contention can only rest on the theory that "approval" was a condition precedent. At this point we need not consider whether it was a condition precedent to the deed (we show *infra* that it was not). We need here only consider whether it was a condition precedent to the arising of contractual rights under the memorandum.

It is vital that we here distinguish between a condition which is precedent to the coming into existence of a contract from conditions which after the contract has arisen qualify or make dependent certain or all the rights thereunder. This distinction is remarked in Williston on Contracts, Rev. Ed., Sec. 666, where it is said:

"In the law of contracts conditions may relate to the *existence of contracts* or to the duty of immediate performance under them".

That the latter (payment prerequisite to the deed) exists here we do not doubt but that is beside the point. By the inherent force of circumstances the "approval" of the deed had to be subsequent to the agreement for the sale. Approval cannot be given to what does not exist. Preliminary rights, "conditioned" on the subsequent granting of approval could, of course, be given and as a practical matter would be the only way by which the sale requested by the heirs could be eventuated. So what was done by the "mem-

orandum" was simply to make a sale subject to being avoided in the event that approval were not given. Even then, there was the implied further condition of good faith, that the United States would approve, both as a duty to the vendor heirs and the purchasers, if the sale met with its standards. The provision for approval was, as to the sale, in effect a provision for a condition subsequent. Until and unless that condition occurred, namely, the refusal of approval, all the parties possessed existing rights; in short the ordinary rights involved in an executory contract of sale of realty; the right of the Indian vendors to receive the money and notes unless the Secretary disapproved; the right of the purchasers to receive an appropriate deed unless the Secretary disapproved; and each owed the duties reciprocal to such rights.

**B.—THE EFFECTIVE DATE OF THE INSTRUMENT WAS NOVEMBER 10, 1925 UNDER THE DOCTRINE OF EQUITABLE CONVERSION.**

We submit that the rule is elementary. In 19 Am. Jur. 11 (Equitable Conversion, Sec. 11) it is stated:

"Thus, an executory contract for the sale of lands works a conversion, since equity regards 'Things agreed to be done as actually performed' and treats the vendor as holding the land in trust for the purchaser, and the purchaser as trustee of the purchase price for the vendor. *The vendee is, in the contemplation of equity, actually seised*



*of the estate.* Hence, he is held liable for any loss that may occur to such estate between the agreement and the conveyance and will enjoy any benefit which may accrue in the same interval. . . . It is a well established principle that, pending the completion of an enforceable executory contract for the sale of real estate, such real estate is considered converted into personalty from the time of the execution of the contract, notwithstanding the fact that an election to complete the purchase rests entirely with the purchaser”.

Under the title of Vendor and Purchaser, Sec. 356, 55 Am. Jr. 783, the rule is stated:

“In equity a contract for the sale of land is treated for most purposes precisely as if it had been specifically performed.” and at page 784:

“A sale by the government, when made in pursuance of law, confers on the purchaser the equitable title to the premises, to the same extent as a sale by an individual holding the fee”.

The case of *Brill v. Stiles*, 35 Ill. 305, 85 Am. Dec. 364, cited to the last proposition fully sustains the statement.

If, as shown above, the fact that the transaction was conditional upon the purchaser not exercising an absolute right to elect not to complete would not bar the doctrine, certainly the fact that completion was contingent on a third person's disapproval, as here, would not do so, absent such disapproval.

C.—THE EFFECTIVE DATE OF THE INSTRUMENTS WAS NOVEMBER 10, 1925 UNDER THE DOCTRINE OF RELATION BACK.

16 Am. Jur. 620 (Deeds, Sec. 321) states:

“With reference to the time of delivery, the general rule is that all the several parts and ceremonies necessary to complete a conveyance are to be taken as constituting one act and to operate, as between the parties and their privies, by relation from the time when the substantial part was performed . . . .”

and on page 621 (Sec. 323):

“As between the parties and *for the advancement of justice, a deed may be deemed to relate back to the date that the grantor agreed to sell and the grantee agreed to purchase the premises*” . . .

~~For~~ 26 C. J. S. 346 (Sec. 94) it is said “It is generally the rule that a deed takes effect from the date of its delivery not from the time of its execution. Under certain circumstances, however, the court applies the doctrine of relation back by which passage of title is considered by operation of law to relate back to a prior date, provided no prejudice results to intervening equities. Accordingly a deed speaks from its date when such is the intention of the parties as where they deliberately antedate the deed.”

and on page 347:

“While it is generally held that a deed executed pursuant to a contract for sale takes effect on delivery, it will be considered for some purposes to relate back to the date of the contract”.

These principles have been repeatedly applied to the very kind of deed here involved. In *Pickering v. Lomax*, 145 U.S. 310, 36 L. Ed. 716, and in *Lomax v. Pickering*, 173 U.S. 26, 43 L. Ed. 601, 19 S. Ct. 416,

Indian lands near Chicago were about a hundred years ago patented to an Indian, Robinson, the patent restricting the right to convey "without the permission of the President." He conveyed to plaintiff's predecessor by deed dated in 1885 and first recorded without any approval by the President. This grantee died, and his Administrator conveyed, as did the grantee of the Administrator, whose grantee, on January 21, 1871 procured approval of the deed from the then President, 13 years after its date. Meanwhile, Robinson conveyed the same property again by deed to defendant made in November, 1870, and approved by the then President on February 24, 1871. Judgment below and in the Supreme Court of Illinois was for defendant on the grounds that the original deed was void for lack of Presidential approval, and that even if such approval gave force to the deed, since the grantee therein was deceased such deed would inure to his heirs, not to those claiming through his administrator.

The Supreme Court held that while the title was imperfect during the interim before approval

"the delay was immaterial provided that no third parties have in the meantime legally acquired an interest in the land".

That the grantee died before approval was immaterial as the "ratification" inured to his grantee, not in the sense that an after acquired title would do so, but "as a deed imperfect when executed may be made perfect as of the date when delivered." The court also said:

“The object of the proviso was not to prevent alienation but to protect the Indian against improvident disposition of his property.”

On the retrial which followed remand the main issue was whether the second grantee took in good faith, that is, whether the recording of the first deed without endorsement was notice. Holding that it was notice, the court reaffirmed its position, describing the prior opinion as holding that the approval was “*retroactive and equivalent to permission before execution and delivery.*”

In *Lykins v. McGrath*, 184 U.S. 169, 46 L. Ed. 485, 19 S. Ct. 450, there was an Indian patent, pursuant to treaty, which contained a restriction upon alienation “without the consent of the Secretary of the Interior.” The patentee conveyed by deed dated June 3, 1864 which was approved by the Secretary on March 10, 1865 but in the interim the patentee died. His heirs sued for possession against the grantees of their father’s grantee. During the time material to the issues there was in effect an Act of Congress providing that permission for sale of such patented lands would be given under such conditions as the Secretary might prescribe. In this respect that case is identical, in effect, with the one at bar. The court held that the *Pickering* case had settled the proposition. Noting the contention that the doctrine should be denied there because “interests of new parties (the heirs) had sprung into being intermediate the execution and approval”,



the Court said:

“But one of the purposes of the doctrine is to cut off such interests and to prevent a just and equitable title from claims which have no foundation in equity. The doctrine of relation may be only a legal fiction but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian’s power of conveyance? Title passed to him by patent, and but for the restriction he would have had the full power of alienation . . . The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it; and that the conveyance be subject to no unreasonable condition or qualification. It was not to prevent sale but to guard against an imposition therein. When the Secretary approved the conveyance it was a determination that the purpose for which the restriction was imposed had been fully satisfied. All this being accomplished, *justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the later. . . .* It is . . . like a deed . . . placed in escrow . . . While ordinarily in case of an escrow title passes on the date of the second delivery, yet often, for the prevention of injustice the deed will relate back to the first delivery so as to pass title at that time”.

The court pointed out that the plaintiff heirs had no superior equities; they were entitled to what the father had at the time of his death and were not bona fide purchasers for value.

More recently, on almost parallel facts where an allottee had given on oil lease on December 5, 1914 and died on October 11, 1915 and the lease was approved by the Secretary on October 21, 1915 and where the law provided that heirs of the allottee could convey with the approval of the county court, and the heirs did re-lease with such approval, in the resulting contest between the two lessees in *Anchor Oil v. Gray*, 257 Fed. 277, Judge Sanborn held for decedent's lessees because the heirs stepped into her shoes, and the first lease estopped them unless the Secretary should have refused to approve the first lease, and when he did approve the estoppel became absolute, against those claiming under either her or the heirs, and the approval related back and took effect as of the date of the execution of the decedent's lease.

To apply this holding to the present case, it is clear that the United States as a "new party" is in no better position than the heirs in those cases. It parted with nothing. It had knowledge of, and indeed had initiated the Hood transaction; in seeking to promote the dike it had no more difficult position against the Hoods than against the many other holders of lands held under conveyances it had approved.

The doctrine was likewise applied to Indian conveyances in: *Snell v. Canard*, 95 Okla. 145, 218 Pac. 813; *Tiger v. Jewell*, 90 Oka. 34, 215 Pac. 1062; *Scioto Oil Co. v. O'Hern*, 67 Okla. 106, 169 Pac. 483; *McElroy v. Peggett*, 167 F. (2d) 668; *Hampton v. E-*

wert, 22 F. (2d) 81; U.S. v. Getzelman, 89 F. (2d) 531 (cert. denied); Harris v. Bell, 254 U.S. 103, 65 L. Ed. 159, 41 S. Ct. 49, Hallam v. Commerce Mining and Royalty Co. 49 F. (2d) 103.

Appellee may urge that since the guardian's deed for the minor heirs was not approved by the state Probate Court until June, 1926 the deed to the Hoods could not have been approved until after the Act. But we answer that this begs the entire question of the operation of the doctrine of relation back. So far as the regulations are concerned the minors appear to have been bound by the memorandum. The guardian's deed was an extra safeguard and formality. But beyond that, it should be noted. Finding IX, Tr. 71, app. vii.) that the date of the guardian's sale was March 8, 1926, prior to the act. That confirmation by the probate court was not accomplished until June is immaterial to its validity, for

“by weight of authority, the confirmation of a judicial sale and the deed executed in pursuance thereof take effect by relation back to the date of the sale”. 31 Am. Jr. 487.

(Literally, the findings said the sale was “after March 8” but also that no special bid was made, so that the sale actually was made as part of the total bid, and must be deemed to have been made at the earliest date).

Thus, all of the formalities of all heirs, adult and minors, necessary for the passing of title had been accomplished by the date of the Act, so that by then

the United States, and the heirs, had performed thier respective obligations under the executory agreement, save only for the formal approval by the Secretary. The stage then was comparable to the situation of the grantee of the first deed in *Pickering v. Lomax*, *supra*, immediately after he received the deed, and the words of the court thereon are particularly apt when it said:

“Had the grantee, the day after the deed was delivered sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay is immaterial . . .”

So, here the entire delay was “immaterial”; certainly not that which was occasioned by formalities which the United States was bound to foresee, and which by the operation of law itself became nullified under the doctrine last above quoted from *Am. Jur.*

That reasoning applies particularly to the deed. But the “memorandum of sale” was also to be approved. Since it was held up and sent with the deed, we must assume that this was pursuant to the department’s own regulations. Otherwise that document could have been approved immediately after its execution. Without the doctrine of relation back, we would be forced to conclude that the Secretary intended his own regulations to be a trap for the unwary or the unfortunate, and by which he could provide an interval in which new burdens could be added to those of the buyers. Such would indeed be “sticking in the bark;” would it not, in effect, be also just plain fraud?



D.—THE UNITED STATES IS ESTOPPED FROM DENYING THAT THE INSTRUMENTS WERE EFFECTIVE AS AGAINST IT FROM THEIR DATES OF EXECUTION.

The authorities immediately *supra* support our contention that there is here an estoppel by deed against the United States. Such an estoppel is “a bar which precludes one party to a deed *and his privies* from asserting against the other any right or title in derogation of the deed”, 19 Am. Jur. 603. By said authorities the deed to the Hoods relates back to November 10, 1925 as between them and the Indian vendors *and their privies*. Is the United States privy to the vendors? If so, the Hoods must be deemed to have acquired title prior to the Diking Act and would be entitled to the same relief given to the other six plaintiffs in this case.

“Privies who are bound by such estoppel include privies in blood *and estate*”, 19 Am. Jur. 604. Privies would certainly include grantees or voluntary lienees such as a mortgagee. All the more so, then, lienees under a compulsory or unilateral lien such as is here sought. Surely the rights of the United States cannot rise higher than their source, namely, the Indian vendors, for it is only on the theory that because of the title of these vendors the land was “in Indian ownership” that it is subject to the lien. Also the United States is a privy by the express language of the warranties in the deed against claims arising by or under the Indian vendors.

In the Pickering, Lykins and Anchor Oil cases, *supra*, the relations back doctrine sustained estoppel against privies under identical circumstances as here, namely, subsequent grantees of the estopped Indian vendor in the first and heirs in the other two.

But we submit that over and beyond the estoppel by deed, which is strictly technical, the present is an appealing instance of estoppel in pais or equitable estoppel. This doctrine is "founded upon principles of morality and fair dealing and is intended to subserve the ends of justice." 19 Am. Jur. 640-641 (Estoppel, Sec. 42). It is essentially one of good conscience; it is based upon the application of the Golden Rule to the everyday affairs of men. (see note 18 to Sec. 42, *supra*). It involves three essentials of the various statements of which the following is particularly apropos: (1) an admission, statement or act, inconsistent with the claim afterwards asserted and sued on; (2) action by the other party on the faith thereof; (3) injury to such other party from permitting the first party on contradict such act, *State ex rel Shartely v. Missouri Utilities Co.* 331 Mo. 337, 53 S.W. (2d) 394, 89 A.L.R. 607 (see note 4 to said section 42). "It holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another, who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury." Sec. 42, *supra*.

Here the United States, both by its legislation auth-

orizing such sale and by the specific acts of its agents, induced the Hoods to part with their money and notes on the promise contained in the memorandum that upon payment of the latter, a "deed duly executed and approved . . . conveying said land to them . . . pursuant to law" would be delivered to them. What kind of a deed, what kind of conveyance? Clearly that kind which would "convey the land"—not a partial interest in the land; not a title that was half a title; not a title that contained in it the seeds of its own possible destruction. Good faith, conscience, morality, all these meant that the United States pledged that and no other.

The very history of the transaction is proof that the Hoods relied on this position of the United States. What else would prompt them to part with \$10,100-.00?

Are they injured? Yes, if the United States thirty years afterwards is allowed to change its position and say that its left hand did not know, and is not bound by, what its right hand is doing. Yes, if without their consent they are required to pay substantial sums for that which they do not believe is of benefit, and which they, their "heirs and assigns" will continue in perpetuity to be required to pay for operation and maintenance.

In short, they made a present deal in November with the measure of their obligation and benefits fixed. Midway of the game, in March following, the other side changed the rules.

No court would permit such conduct to a private party. Is it open to the sovereign? Clearly not on the ground of social morality. Nor on legal grounds. It is true, we concede, that the government may not be estopped by acts of its agents. But here the government in imposing the diking lien is not acting in an administrative or ministerial capacity but as a corporate body through the Congress. It is, moreover, acting in connection with private rights. While its actions with reference to care of the Indians is a social duty grounded in morality, when it deals with their properties it is dealing as any other guardian or custodian; the more so when such dealing involve the private rights of other parties. So it is held , 54 Am. Jur. 632:

“So far as the United States acts in a proprietary capacity or enters into contract relationships, an estoppel may be asserted against it provided the functions of government are not impaired thereby.”

No function was here impaired. The Act recognized that the dike might benefit private lands. It dealt with the problem of asserting the costs against such lands. That there were substantial amounts of such land is shown by the complaint of the six other plaintiffs. To embrace one more tract to those in the category of privately owned lands would hardly impair a function of government.

There is authority that holds that estoppel may be applied against the United States. See Annotation in



23 A. L. R. 1420 (ann. 1423 et seq) *Banson v. Wirth*, 17 Wall. (US) 32, 21 L. Ed. 566 and *Fletcher v. Peck*, 6 Cranch (US) 87, 3 L. Ed. 162. In the latter where a deed was issued to public land pursuant to a proper statute, the legislature subsequently could not repeal the statute and annul the grant because of fraud in the procurement in the passage of the statute as against an innocent purchaser. In the former it was said that if the United States should issue a patent for one quarter-section of land, the patent would estop it from reclaiming the land and asserting it intended to grant an adjacent tract.

AT THE LEAST THE APPELLANTS HAD A VESTED PROPERTY RIGHT PRIOR TO THE ACT WHICH THE LIEN UNDER THE ACT WOULD IMPAIR CONTRARY TO DUE PROCESS.

Whatever may be said as to the contentions raised above, it is clear that upon the execution of the memorandum the Hoods had vested rights and that these constituted property. They had the right from that time on to have the Indian agent procure the execution of the deed and to have it submitted to the Secretary and if approved to receive the deed with the warranted title it would convey, and to have that title unimpaired by any arbitrary act of the United States.

At the very least this right is comparable to those

acquired upon the acceptance of a bid or offer in a judicial sale.

“He (the purchaser) acquires, by acceptance of his bid, a vested right, sometimes called an equitable or inchoate title, which is recognized and enforced by law, and must be respected by the court and may not be disregarded or taken away from him except for sufficient legal or equitable reasons”. 31 Am. Jur. 477.

All of the arguments we have previously urged as to the inviolability of the Indian fee title to the arbitrary lien proposed by the Act apply fully as much to these vested rights of the Hoods. It is elementary that this constitutional safeguard applies to all qualities of private rights in property. If the Act be deemed to apply to the Hoods, then it must be held unconstitutional.

### IN ANY EVENT THERE IS NO LIEN UNDER THE ACT FOR OPERATION AND MAINTEN- ANCE.

In addition to the \$399.40 claimed by the United States under its asserted lien for the construction charges of the dike, the judgment included recovery of \$1207.77 for operation and maintenance up to and including July 6, 1955. (Finding XI. Tr. 73 app. ix, Tr. 82 and see Judgment, Tr. 83).

We submit that the record is completely devoid of any foundation whatsoever for the imposition of any charge for operation or maintenance. Whatever may

be the social justification in the eyes of the Indian administrators for the dike and/or its operation and maintenance they may not impose a charge therefor without a warrant of law. It should be conceded that any legislation to impose a burden on property will be strictly construed. But there seems to be not even any language to construe. On this subject, the court will find the statute a blank. Independently of all other contention raised on this appeal, the allowance of this item should be reversed.

### CONCLUSION

The presentation of appellants' case has been fraught with features that have been unhappy to them and their counsel. They have sharp things to say. That these are deemed necessary we regret. Nevertheless our belief in our position leaves no other avenue; particularly if one holds as is the conviction of both appellants and their counsel, that where government offends it is the duty of citizenship to protest, the more so when means of so doing are possessed. Obviously, the mere dollars and cents involved would have by themselves made the appeal of doubtful material advisability.

This requires a further statement. Offhand, appellants and the other plaintiffs might appear to be motivated by the hope of getting a "free ride." But, in truth, they all denied, either wholly or largely, the factual existence of benefits, remembering that for decades their lands had been productive *without the dike*. Rather, in their view, the project would compel them

to contribute improvements to others, without corresponding benefits. Further, we submit that even a cursory look at the lien contract requested of them will raise justification for their position. By signing, their lands would be bound forever to such additional costs, both of construction and maintenance, which executive order, without the necessity of consultation or participation by them in any decision, might see fit or find the means of incurring it. (See Ex C. tr. 21)

Without intending the slightest retraction of these views, we can recognize the administrative dilemmas imposed upon the Indian Bureau; first, of course, in deciding whether to act without the unanimity of contracts required by the act; secondly, in seeking maintenance, where no maintenance was Congressionally provided for. But we have not found that such sympathy either justifies what to us are offenses, or allays the duty to resist submission.

Rather, we think, these factors, more sharply focus in human terms the merits of our contentions, both constitutional and those grounded in contract and equity.

Respectfully submitted,

DONALD M. BUSHNELL,

ATTORNEY FOR APPELLANTS.







*APPENDIX*

ACT OF MARCH 8, 1926, 44 STAT. 211-12

“An Act for the purpose of reclaiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes.”

Sec. 1. That there is hereby authorized to be appropriated the sum of \$65,000 or so much thereof as may be required, for reclaiming by construction of dikes approximately four thousand acres of land in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington: Provided, that the total cost of the project shall be distributed equitably among the lands in Indian ownership and the lands in private ownership that may be benefited in accordance with the benefits received as designated by the Secretary of the Interior.

Sec. 2. The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such lands.

Sec. 3. No part of the sum provided for herein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of this

ii.

*Percy Hood and Grace Hood vs.*

Act and in form approved by the Secretary of the Interior shall have been properly executed by the land-owners whose lands may be benefited by the project.

Sec. 4. The Secretary of the Interior is hereby authorized and directed to declare by public notice the cost of the project and the equitable share to be assessed against the lands, benefited in accordance with their respective benefits, which cost shall be repaid in annual installments, the first installment to be 5 per centum of the total charge and be due and payable on the 1st day of December of the third year following the date of such public notice, the remainder of said costs with interest on deferred amounts against land in private ownership from the date of said public notice to be 4 per centum per annum to be payable on each December 1 thereafter, on the same basis as the first installment, until the obligation is paid in full.

Sec. 5 The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

MEMORANDUM OF SALE OF ALLOTTED LAND  
(WHEN CONVEYANCE IS DONE BY DEED).

The undersigned Percy Hood and Grace H. Hood, his wife, having on November 10, 1925, purchased



Lots 5, 6 and 7 of Sec. 6, Twp 38 N., Range 2 E., W. M., containing 79.82 acres more or less allotment No. Lummi 22 of Lummi Indian Reservation, Washington, for \$10,100.00, and having made a payment of \$2,525.00 being 25 per cent thereof, and agreed to pay the balance thereof, being \$7,575.00 in deferred payments as evidenced by four promissory notes of even date herewith for \$1,893.75 each, numbered from one to four payable to the Superintendent or other officer in charge of the Tulalip Indian Reservation, on or before 1, 2, 3, and 4 years after date, with interest at the rate of six per cent per annum, payable annually from the date of approval of this memorandum by the Secretary of the Interior;

Now This Memorandum Witnesseth: That upon the payment in full by said Percy Hood and Grace H. Hood, his wife, of said sum of \$7,575.00 being the balance of said consideration of \$10,100.00, with interest thereon, according to the tenor and effect of said notes, then and in such case a deed duly executed by said heirs of Mary Yahimaloo, and approved by the Secretary of the Interior, shall be delivered to said Percy Hood and Grace H. Hood, his wife, conveying said land to them and their heirs pursuant to law.

And said Percy Hood and Grace H. Hood, his wife, agree that upon default by them in the payment of said notes or either of them or the interest thereon, the sale of said land to Percy Hood and Grace H. Hood, his wife, may, at the option of the Secretary of the In-

terior, be cancelled and said land readvertised for sale, and in such case the sum of \$2,525.00, being 25 per cent of the amount agreed to be paid by said Percy Hood and Grace H. Hood, his wife, shall be forfeited as provided by law for the use of the heirs of Mary Yahimaloo, vendors, and any balance remaining of the amount paid by said Percy Hood and Grace H. Hood, his wife, after deducting said 25 per cent forfeiture, shall, in case the same is not repaid to Percy Hood and Grace H. Hood, his wife, by the vendors, be repaid them out of the proceeds of such subsequent sale, or from such other sources as may be applicable in the discretion of the Secretary of the Interior;

It is further understood and agreed that the deed hereinbefore provided for shall be retained in escrow by the Commissioner of Indian Affairs until all the notes and interest before mentioned shall have been paid, when it shall be delivered to said Percy Hood and Grace H. Hood, his wife, as hereinbefore provided.

Signed at Ferndale, Washington, this 10th day of November, 1925.

(s) W. F. DICKENS,  
Superintendent and  
Disbursing Agent;  
(s) PERCY HOOD;  
(s) GRACE H. HOOD,  
Purchaser.

Stamp: Department of the Interior, Washington,

D. C., Aug. 10, 1926.

Approved:

(6856)

(s) JOHN H. EDWARDS,  
Assistant Secretary.

PERTINENT FINDINGS OF FACT  
VII.

That the lands of the plaintiffs, Percy Hood and Grace Hood, involved in this cause are described as

Lots 5, 6 and 7, Section 6, Township 38 North of Range 2 E. W. M., containing 79.82 acres more or less.

That pursuant to treaty between the United States and the Lummi Indians the said tracts were first allotted and later patented to "Mary Yahimaloo or Mary" by the United States by its patent issued and dated December 31, 1885, copy of which as Exhibit D was made part of the complaint in this cause and by reference made part of this Finding; that by its pertinent provisions the United States did "give and grant" said tracts to said grantee, subject to a stipulation that "the same should not be aliened, "and to have and to hold the same unto "her and her heirs forever, with the stipulation aforesaid"; that the same and similar patents were known and referred to by the Indian Bureau as "restricted fee patent"; that thereafter (Congress provided that)\*<sup>1</sup> pursuant to and on conformity with legislation and regulation of the Bureau of Indian Affairs providing for the release of such

\*<sup>1</sup> Words in bracket inserted in original finding by error.

restrictions and the alienation of such lands and (of)\* the request of the heirs of Mary Yahimaloo (to whom title to said property had descended upon her death), and after formal invitations to bids, had brought no offers, the plaintiff, Percy Hood, at the suggestion of the Commissioner of Indian Affairs, made an offer, which was incorporated into an Indian Bureau form entitled "Memorandum of Sale," on and under date of November 10, 1925, copy of which, as Exhibit E thereto was made part of the complaint, and which by (Congress provided that) pursuant to and on consigned in behalf of said Department by "W. F. Dickens, Superintendent and Disbursing Agent" of the Agency having charge thereof, and by the plaintiffs Percy Hood and Grace Hood (here follows digest of contents for the full text of which see this appendix, page —) that the said down payments and notes, so dated, were given by the Hoods to said Agent in charge on the same date, to wit November 10, 1925.

### VIII.

That at the same time, and bearing the same date of November 10, 1925, there was prepared at the office of said Agent the "Indian Deed of Inherited Land," a copy of which as Exhibit F was attached to and made a part of the complaint, which recited as grantors the names of some twenty-three heirs of Mary Yahimaloo and the said W. F. Dickens, referred to as "Legal Guardian of" four named minor heirs, two having 2-864th and two having 8-864th undivid-

\* "of" is in error for "at"



ed interests therein, and provided that in consideration of \$10,100.00, the grantors "do hereby grant, bargain, sell and convey unto" Percy Hood, his heirs and assigns forever, the said real property, and that the grantors "covenant, promise and agree" with said Hood, his heirs and assigns, to "warrant and defend said premises against the claims of all persons, claiming or to claim by, through, or under them only"; that the said deed bears the signatures of all said adult heirs, and their respective acknowledgments taken at various dates from November 16, 1925 to January 16, 1926; that said signatures and acknowledgments were obtained by or through said Indian Agency.

### IX.

That after the making of said "Memorandum of Sale" Walter F. Dickens, the Superintendent of the Agency, procured the appointment of himself to be the guardian of the four minor heirs, in separate causes, in the Superior Court of Whatcom County, Washington, and thereafter proceedings were had thereunder in which he was authorized and did sell the interests of said minors to Percy Hood; that the consideration recited in said probate proceedings was the proportion of the total consideration of \$10,100.00 required of the Hoods which was in ratio to their respective undivided interests; that in fact the Hoods paid no other or separate consideration than the original offer of \$10,100.00 except for interest on their deferred notes, and made no separate nor distinct bid in

the guardianship proceedings; that the return of sale in said proceedings referred to the sale as being made after March 8, 1926, but did not specify any date but the orders of confirmation were entered on June 4, 1926; that thereafter the "Memorandum of Sale", which had been withheld from the Hoods up to that time and the said deed, the latter being plaintiff's Exhibit II were sent to the Office of the Commissioner of Indian Affairs in Washington and both were thereafter approved on or about August 10, 1926, by the Secretary of Interior by his Assistant; that thereupon one of the copies of the "Memorandum of Sale" was handed to Mr. Hood, but said deed was held in escrow by said Superintendent; that on about the month of April, 1928, and before the maturity of all of said notes the Hoods paid the balances due on said notes and said deed was delivered to them; that although the deed above mentioned was signed by said Walter F. Dickens as guardian and acknowledged by him on or about June 4, 1926, two deeds were given by him, respectively covering the said undivided interests of the said minors which were also duly approved on or subsequent to August 10, 1926, by the Secretary of the Interior;

#### X.

That in the "Schedule of Charges" incorporated by reference into the Public Notice heretofore mentioned the Secretary of Interior classified the lands within

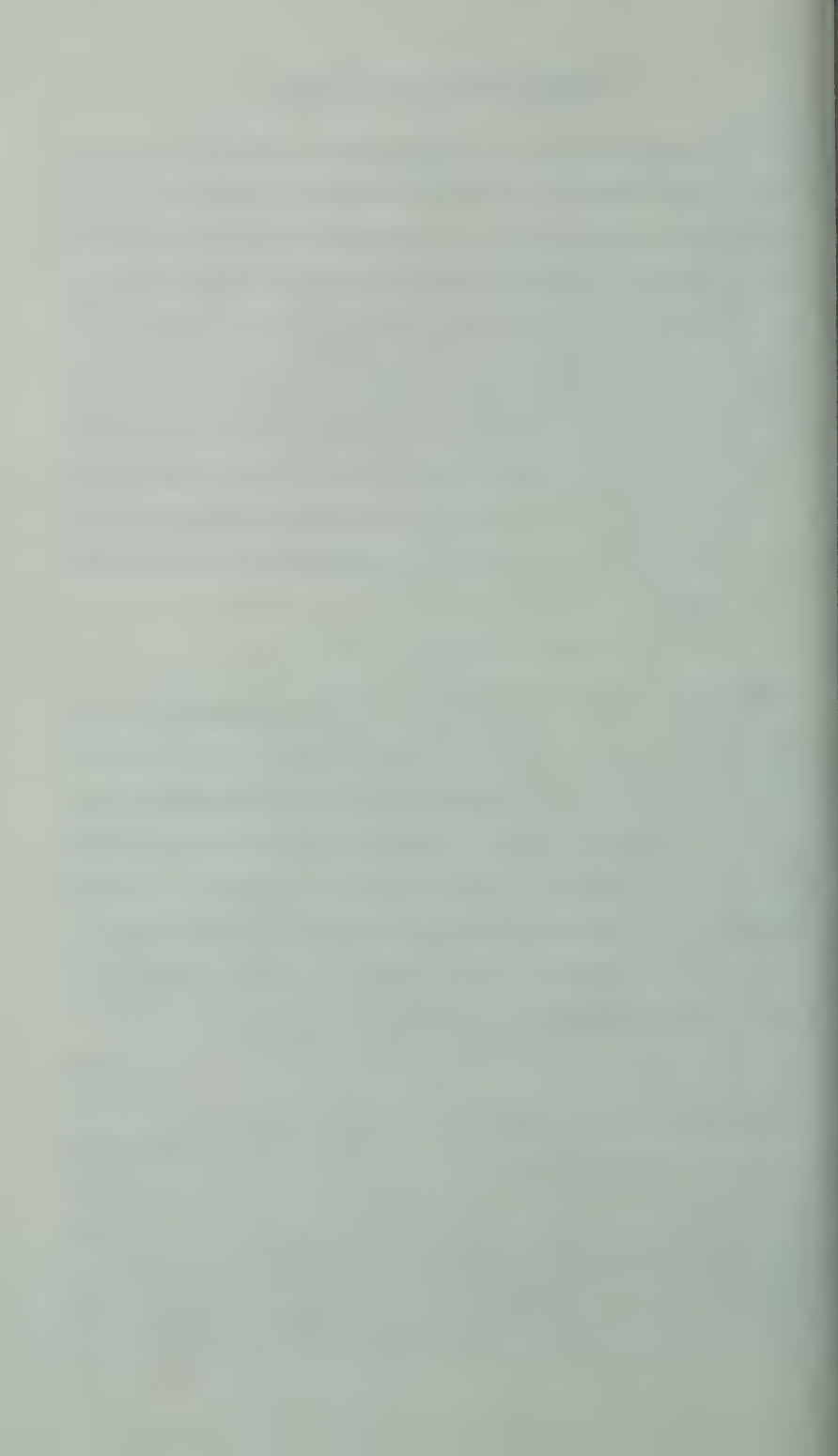
the Project as W (for lands owned by white persons) and I (for lands owned by Indians); that in such Schedule he classified the said lands of Percy and Grace Hood as white owned; that at various times through his agents the Secretary solicited the said Hoods to sign repayment contracts; that they have never signed any such contract with reference to said lands; that as to lands in Indian ownership held under restricted fee patents repayment contracts were solicited of the the owners and signed with respect to 48 out of 61 such tracts;

## XI.

That the total construction charges assessed by the Secretary of the Interior against the Hood land are \$399.40; that the total operation and maintenance charges assessed thereto computed to July 6, 1955 are \$1,270.77; that the United States claimed penalty charges on said operation and maintenance charges as of July 6, 1955, in the amount of \$561.99; all of which \$561.99 is disallowed by the Court.

## XII.

That there is no showing that any patent was ever issued by the United States as to the Hood land after the going into affect of the Act of March 18, 1926, and the title of the Hoods derived only through said conveyance by or for the heirs of Mary Yahimaloo.





No. 15267

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**PERCY HOOD AND GRACE HOOD, HIS WIFE, APPELLANTS**  
*v.*

**UNITED STATES OF AMERICA, APPELLEE**

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**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN  
DIVISION**

---

**BRIEF FOR THE UNITED STATES, APPELLEE**

---

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**FILED**

**FEB - 8 1957**

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No. 15267

PERCY HOOD AND GRACE HOOD, HIS WIFE, APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

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*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN  
DIVISION*

---

**BRIEF FOR THE UNITED STATES, APPELLEE**

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**OPINION BELOW**

The district court's oral opinion is set out at R. 59-62.

**JURISDICTION**

This suit was instituted by appellants and others not involved in this appeal to quiet title to their lands on the Lummi Indian Reservation in the State of Washington. The suit was originally brought in the Superior Court of the State of Washington for Whatcom County (R. 5) and later removed by the United States to the United States District Court for the Western District of Washington, Northern Division (R. 3, 37). Jurisdiction was asserted under 28 U. S. C. Sec. 2410. The United States moved to dismiss for want of jurisdiction as to the lands other

than the appellants and filed a counterclaim as to appellants under authority of the Act of March 18, 1926, 44 Stat. 211, and acts supplemental thereto. Judgment quieting title to the lands of the landowners other than appellants and foreclosing a lien on lands of appellants was entered on May 9, 1956. A timely motion for a new trial was denied June 4, 1956 (R. 87), and notice of appeal was filed August 2, 1956 (R. 87, 88). The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1291.

#### QUESTIONS PRESENTED

1. Whether Congress had the power to and did impose a lien on these lands by the Act of March 18, 1926, and, if so,
2. Whether the lien embraced charges for operation and maintenance.

#### STATEMENT

The appellants, and others not involved in this appeal, brought this action to quiet title to certain lands in Whatcom County, Washington, within the original boundaries of the Lummi Indian Reservation.

By the Act of March 18, 1926, 44 Stat. 211, Congress authorized the appropriation of \$65,000 for the construction of dikes to reclaim some 4,000 acres of land in and adjacent to the Lummi Indian Reservation (R. 19). Some of the land was Indian land and some was held by private individuals. The act provided that the cost of the project would be distributed equitably among the lands in Indian ownership and those in private ownership which might be benefited by the project. The act imposed a lien on all Indian land

involved for its pro rata share of the construction costs and it provided that no money should be expended until repayment contracts were executed by the owners of the private lands benefited (R. 19-20). These repayment contracts imposed a lien on the lands involved (R. 22). The construction costs were to be paid in annual installments with interest at 4% per annum until the total indebtedness has been paid (R. 20).

When the Act of March 18, 1926, became effective, the appellants were in the process of buying this property from the Indian heirs of Mary-Ya-Him-a-Loo, who had obtained an allotment and patent to the land under authority of the Treaty of January 22, 1855 (R. 25), on December 31, 1884. The patent was in fee simple subject, however, to restrictions upon alienation without the consent of the Secretary of the Interior. On November 10, 1925, the appellants and the Superintendent of the Reservation, Mr. W. F. Dickens, executed a memorandum of sale for the land and the appellants paid down the sum of \$2,515 on a purchase price of \$10,100 (R. 28-30). At the time of the execution of the memorandum of sale, appellants, the Indian heirs, and Mr. Dickens, as guardian for some of the minor Indian heirs, executed a deed to the land (R. 31, 70). The deed and memorandum of sale were not approved by the Secretary of the Interior until August 10, 1926. At that time a copy of the memorandum of sale was handed to the appellants, but the deed was held in escrow by the Superintendent of the Reservation. After the appellants had paid the notes for the balance of the purchase price in April

1928, the deed was delivered to the appellants (Fdg. IX, R. 72).

On August 19, 1930, the Secretary of the Interior promulgated, pursuant to Section 4 of the Act of March 18, 1926, his "public notice" reciting that he was distributing the total cost of the project among the lands benefited in accordance with a schedule of charges attached to the notice (Fdg. VI, R. 66). The notice appears in 25 C. F. R. Sec. 144 (1949). Thereafter, agents of the Secretary of the Interior have sought without success to secure from the appellants and others repayment contracts (Fdg. X, R. 72-73).

This led to title confusion and on June 8, 1953, the appellants and others holding title to land in "white ownership" who had not signed repayment contracts filed a complaint in the Superior Court for the State of Washington asserting that the waiver of sovereign immunity in 28 U. S. C., Sec. 2410, as to lien claims applied (R. 5-15). The suit was removed to the United States District Court for the Western District of Washington on June 26, 1953 (R. 37). The United States filed answers to all plaintiffs, and filed a counterclaim against appellants claiming a lien on the appellants' property on the ground that at the time of the passage of the Act of March 18, 1926, the property was Indian land and therefore burdened with the lien as provided by the Act (R. 45-49). The appellants answered the counterclaim alleging that their title related back to the memorandum of sale on November 10, 1925, and therefore their land was "private" land and not subject to the automatic lien of the Act (R. 50-58).



The case was heard July 11, 1955. On May 7, 1956, the district court entered its findings of fact and conclusions of law (R. 62-75). The district court held that those plaintiffs, other than appellants, were entitled to have their titles quieted against asserted liens (R. 74). It further held that notwithstanding the memorandum of sale and the payment of a substantial sum on the purchase price, the lands of the appellants were subject to an involuntary lien to secure the construction charges and the operation and maintenance charges (R. 74). It then decreed the foreclosure of the lien as requested in the Government's counterclaim (R. 75). A timely motion for a new trial was denied on June 4, 1956. This appeal followed.

#### ARGUMENT

Appellants advance their argument generally along two main points; first, the nature of the Indian title and, secondly, that title to the lands effectively passed by various equitable means to appellants prior to the passage of the Act of March 18, 1926. They contend that these two factors relieve their lands from the burden of the lien created by the Act. We will show that the appellants' contentions are wrong and that the trial court was correct, both legally and equitably, in holding that the Act of March 18, 1926, applied to the appellants' lands.

#### I

**The 1926 Act validly imposed a lien upon lands allotted to individual Indians**

Much of appellants' brief is devoted to an argument, founded primarily on the fact that the allottee had

been granted a fee title subject to restrictions upon alienation rather than a trust patent, that the lien either was not intended to be or could not, constitutionally, be imposed on the lands in the hands of the Indian heirs. The argument is plainly wrong in both aspects.

A. *The Act of March 18, 1926, imposing a lien on all lands in Indian ownership, covered the lands involved in this case.*—The appellants imply (Br. 29) that the Act may be applied only to tribal lands on the reservation and not to lands that had been allotted to Indians by patents. But the Act refers generally to lands in “Indian ownership” and not merely tribal lands. The normal meaning of that language would be to embrace both categories of Indian property. The legislative history of the Act clearly refutes appellants’ narrow definition of ownership.<sup>1</sup> The Senate Report shows that all of the lands on this reservation had been allotted. It is also evident from the report that Congress clearly understood that part of the reservation and adjoining lands were partly in Indian and partly in private ownership. Therefore when the Act plainly imposes a lien on Indian land, it imposed a lien on all allotted Indian land on the reservation. To hold otherwise would render the Act nugatory, since all lands had been allotted.

B. *Congress had power to impose a lien upon lands allotted to individual Indians.*—The nature of the title and particularly the powers reserved to the United States under patents to Indian allottees has

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<sup>1</sup> The Senate Report on the bill, S. Rept. 354, 69th Cong., 1st Sess., is printed in full in the Appendix.

long since been settled. In *United States v. Gilbertson*, 111 F. 2d 978 (C. A. 7, 1940), the Court, in discussing a patent in fee with restrictions upon alienation said (p. 980):

\* \* \* The capacity of the United States to sue in its own name, in its own courts to enforce such restrictions as may have been imposed upon the alienation of the allotted lands is no longer open to question. *Heckman v. United States*, 224 U. S. 413; *Goat v. United States*, 224 U. S. 458. After the issuance of a patent under statutory provisions limiting the power of the Indian grantee to alienate the land conveyed, power remains in Congress to extend, or to provide that the Executive may extend, in his discretion, the period of limitation, provided such power is exercised prior to the expiration of the period of restriction. *United States v. Jackson*, 280 U. S. 183; *Tiger v. Western Investment Co.*, 221 U. S. 286; *United States v. Bartlett*, 235 U. S. 72. The restriction against alienation binds the land for the period restricted, and the death of the allottee and inheritance of the land by his heirs does not operate to remove the restriction, except in cases where Congress has expressly limited the restriction to the lifetime of the allottee. *Bowling v. United States*, 233 U. S. 528; *Gannon v. Johnston*, 243 U. S. 108. In general, statutes passed for the benefit of dependent tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78; *Choate v. Trapp*, 224 U. S. 665.

Appellants' attempt to create a wide difference between the power of Congress over trust allotments and over fee allotments (e. g., Br. 23-24) flies in the face of controlling authority. In *West v. Oklahoma Tax Comm'n.*, 334 U. S. 717, 726 (1948), the court said:

We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same. *Board of Commissioners v. Seber*, 318 U. S. 705, 717; *United States v. Ramsey*, 271 U. S. 467, 471. Both devices have the common purpose of protecting those who have been found by Congress to be unable yet to assume a fully independent status relative to property. \* \* \*

See also *Minnesota v. United States*, 305 U. S. 382, 386, footnote 1 (1939).

It is equally well settled that the fact that Indians were, under various statutes, made citizens of the United States, in no way limited the power of Congress over their affairs. *United States v. Celestine*, 215 U. S. 278 (1909); *Heckman v. United States*, 224 U. S. 413 (1912); *Tiger v. Western Investment Co.*, 221 U. S. 286 (1911). Regarding the constitutionality of the Act involved in the *Tiger* case the Court states at p. 310:

Assuming the the defendants in error [Tiger's grantees] are in a position to assert such constitutional rights, is there anything in the fact that citizenship has been conferred upon the Indians, or in the changed legislation of Congress upon the subject, which marks a deprivation of such rights? We must remember in



considering this subject that the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent people and to legislate concerning their property with a view to their protection as such.

and the Court concludes, page 316:

Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case when the Act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.

The following year, 1911, the Supreme Court had to determine if the United States had capacity to sue in its own courts to enforce the restrictions against alienation of allotted lands. In *Heckman v. United States*, 224 U. S. 413 (1912), the Supreme Court decided that the United States did have the

power to sue to enforce these restrictions. The court in that case discusses the history of the relationship between the United States and the Cherokee Indians. It states that restrictions on alienation were "an essential part of the plan" of individual allotment of tribal property, p. 436. And it further held that these restrictions were a continuance of the guardianship which the United States had exercised from the beginning. It stated that the continuance of this guardianship was in the national interest.

*This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.* When, in 1838, patent was issued to the Cherokees providing that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured \* \* \*. "A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States" (pp. 437-438). [Emphasis supplied.]

Thus the appellants' view that the Indian heirs of Mary-Ya-Him-a-Loo possessed such a title as to put it beyond the power of Congress to change, and an attempt to change it on the part of Congress is void and unconstitutional, is not supported by the cases. They rely mainly on the decisions of Judge Hanford in *Ross v. Eells*, 56 Fed. 855 (N. D. Wash., 1893),

and *United States v. Kopp*, 110 Fed. 160 (W. D. Wash., 1901), and the decision (not Judge Hanford's) in *Eastman v. United States*, 28 F. Supp. 807 (W. D. Wash., 1939).

Judge Hanford in the *Ross* and *Kopp* cases is under the erroneous impression that the allotment and the granting of citizenship to the Indians completely removed the United States from any control over the land and the Indians. On appeal the Circuit Court reversed the *Ross* case, *Eells v. Ross*, 64 Fed. 417 (C. A. 9, 1894), holding that the granting of land to Indian allottees and granting of citizenship to the same Indians did not revoke the reservation and that the restriction against alienation was not inconsistent with citizenship.

Later, in 1901, in *United States v. Kopp*, 110 Fed. 160 (W. D. Wash., 1901), in a prosecution for selling liquor to an Indian on the same Puyallup Reservation, Judge Hanford noted the fact that he had been reversed in the *Ross* case because the land involved was within the boundaries of the reservation. Nevertheless, he held that since a considerable part of the patented land had been sold the reservation had been abolished. The subsequent Supreme Court cases, *supra*, set at rest any possible doubts as to the error of Judge Hanford's view.

The appellants cite certain language of *Eastman v. United States*, 28 F. Supp. 807 (W. D. Wash., 1939), to support the proposition that the federal government could not interfere with an Indian's use of his allotment and particularly the court's theory that "Any

Act which excludes the allottee from full enjoyment of the timber on his land, is an interference with his right of ownership" and the Secretary is without power to regulate regarding the sale of timber on these allotments.

The error of appellants' argument has already been demonstrated by this Court when it reversed the *Eastman* case, *United States v. Eastman*, 118 F. 2d 421 (C. A. 9, 1941), certiorari denied, 314 U. S. 635 (1941). This Court held that the power given to the Secretary of the Interior, by the Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. A. Sec. 406, to make regulations regarding the proceeds to be realized from the sale, with the consent of the Secretary of the Interior, of timber on an Indian allotment held in trust, extended to requiring selected cutting. It was held that the "power to condition the consent of the Secretary or to prescribe the terms upon which it will be given is rather obviously implied" (p. 424).

It is interesting to note that in this case the Indian allottees object to a charge that the Secretary imposed, incident to the sale of the timber. This fee was to be covered into the Treasury as miscellaneous receipts. The Indians asserted that their property is immune from charges of this sort by virtue of the Treaty of July 1, 1855, 12 Stat. 971. This Court stated that it found nothing in the treaty which could be thought to limit the power of Congress in this respect (p. 425).

The constitutional power of Congress to impose upon the allotments in the Lummi Reservation the expenses of the improvement involved, is we submit, perfectly clear.



## II

**Equitable considerations cannot be invoked to pass title to appellants prior to approval by the Secretary of the Interior and delivery of the deed to the appellants**

Appellants assert that because of various equitable doctrines, title to the land involved here passed to them on November 10, 1925, prior to the passage of the Act of March 18, 1926, and prior to the approval and delivery of the deed by the Secretary of the Interior. These equitable doctrines do and should apply in certain cases involving the sale of real estate. But they have no application here. In the first place they cannot apply since the Secretary of the Interior was without the power to grant a greater title than that authorized by Congress. As we have shown Congress had imposed a lien on this land before the date the Secretary gave his approval. Congress referred to lands in "Indian ownership" at the date of the Act and made no provision for pending but not consummated sale negotiations. It is clear that the Secretary could not fly in the face of this action by Congress and grant a title free of this lien. That is what the appellants attempt to accomplish here.

The appellants argue that the memorandum of sale was an executory contract and that title passed to them by the doctrine of equitable conversion. The one case cited by them, *Brill v. Stiles*, 35 Ill. 305 (1864), does not involve restricted land so it obviously does not aid the appellants here. To have any validity at all this argument must presuppose two things: first, that the parties to the contract were capable of performance at that time and, second, that nothing

remained to be done but the payment of money. Both are absent in this stage of the transaction. The Indian heirs were under a disability and they did not have a title that they could pass on November 10, 1925, and approval by the Secretary of the Interior was required by treaty and set out in the memorandum of sale itself (R. 29) before title could be conveyed to the appellants. Thus, it is only after approval of the memorandum and the deed by the Secretary of the Interior that the Indian heirs did have a title that they could convey.

The appellants next rely on the equitable doctrine of relation back (Br. 44-50). This unusual doctrine is invoked by the courts in order to do justice and the courts realize they are resorting to legal fiction when it is used. The cases cited by appellants to support them show the type of fact situation in which the courts feel they should use this legal fiction. The facts of those cases are generally that the Indian grantor dies before approval by the Secretary and his heirs sue to recover the property from his grantees or his assigns. It is clear that in situations like that the doctrine should be applied. The doctrine does not apply if rights of third parties have intervened superior to the one claiming under the deed. *Lykins v. McGrath*, 184 U. S. 169, 173 (1902). Here the Congress, which as we have shown, *supra*, pp. 6-12, had control over the land, enacted legislation concerning the land which it considered beneficial. See Senate Report No. 354, accompanying H. R. 60, 69th Cong., 1st Sess. The report states: "Most of the land within

the project covered by this bill is of very little value in its present state, but if diked and drained as contemplated it is estimated after such improvements the value of these lands will run from \$200 to \$450 per acre." Also in a letter to the Chairman of the House of Representatives Committee on Indian Affairs the Secretary of the Interior states: "The reclamation scheme involves two separate units and will be accomplished by the construction of dikes. One unit is to prevent the tidewaters of Lummi Bay from overflowing part of the lands, while the other unit is to accomplish a similar purpose by preventing the Noonsack River from overflowing the remaining area of the lands. These lands are exceedingly fertile and their reclamation will greatly benefit the Indians by providing adequate farm areas for them." This letter was made part of the report. Therefore, it is clear that a situation does not exist here where the interests of justice would best be served by employing the fictional doctrine of relation back. We feel that the contrary would result.

The appellants next contend (Br. 51) that the United States is estopped from imposing a lien on this land. The doctrine of estoppel clearly cannot be applied here since the appellants knew, or should have known, that no title passed until approval of the deed by the Secretary, and the action of government agents before that time in entering into a memorandum of sale cannot curtail the power of Congress to legislate regarding the lands under its control.

Thus the various equitable considerations relied on by appellants must fail. Conversely, the equities lie

with the United States since, as we have shown, the action taken by Congress was to improve the land and thereby raise its value. The appellants should pay their fair share of this improvement. Therefore, we submit that this Court does not have the power to negative an action by Congress regarding lands under its control.

### III

#### **The appellants are liable for maintenance charges imposed on the land by Congress**

Appellants assert that the record is "devoid of any foundation whatsoever for the imposition of any charge for operation or maintenance" (Br. 56). However, Congress has on several occasions, 44 Stat. 856, 46 Stat. 1129, 47 Stat. 832 and 1608, 49 Stat. 1772,<sup>2</sup> appropriated various amounts for "further construction" and "flood damage." It required that these damages be "reimbursable." It is clear that it was contemplated that this reimbursement would be paid by assessments against the landowners whose lands were burdened with a lien. This necessarily must be so since there was no one else to make reimbursement. Since we have shown, *supra*, that these lands are burdened with a lien, it follows that the appellants are liable for their pro rata share of the reimbursement of these appropriations.

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<sup>2</sup> These will be set out in the Appendix.



## CONCLUSION

For the above reasons the decision of the court below should be sustained.

Respectfully,

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CHARLES P. MORIARTY,  
*United States Attorney,  
Seattle 4, Washington.*

F. N. CUSHMAN,  
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ROGER P. MARQUIS,  
REGINALD W. BARNES,  
*Attorneys, Department of Justice,  
Washington, D. C.*

FEBRUARY 1957.

## APPENDIX

[69th Congress, 1st Session, Senate, Report No. 354]

FOR THE PURPOSE OF RECLAIMING CERTAIN LANDS IN  
INDIAN AND PRIVATE OWNERSHIP WITHIN AND IM-  
MEDIATELY ADJACENT TO THE LUMMI INDIAN  
RESERVATION

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MARCH 11, 1926.—Ordered to be printed

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Mr. DILL, from the Committee on Indian Affairs,  
submitted the following

### REPORT

[To accompany H. R. 60]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 60) for the purpose of reclaiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are fully set forth in House Report No. 271, Sixty-ninth Congress, first session, which is appended hereto and made a part of this Report.

[House Report No. 271, Sixty-ninth Congress,  
first session]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 60) for the purpose of re-

claiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes, having considered the same, report thereon with a recommendation that it do pass without amendment.

The Lummi Indian Reservation has an area of 12,651 acres, all allotted. It is situate in the northwest corner of the State of Washington. At one time the Nooksack River crossed it and emptied into Lummi Bay. A large part of the lands comprising the northerly end of the reservation consists of low or marsh land, the result of alluvial deposits from the Nooksack River. Later this river broke through its banks, changing its course, and emptying into Bellingham Bay. Its present outlet into Bellingham Bay is at a point about 5 miles east of its former mouth. Approximately 3,400 acres within the reservation of low river bottom land and 600 acres adjacent to its eastern boundary is subject to annual overflows and is mainly covered by water from the river during high-water periods. A portion of the Indian allotments is also covered by salt water on the west side of the reservation during high tides. The reservation has under its jurisdiction 460 Indians.

Most of the land within the project covered by this bill is of very little value in its present state, but if diked and drained as contemplated it is estimated after such improvements the value of these lands will run from \$200 to \$450 per acre.

The report of the Secretary of the Interior on this bill is attached hereto and made a part of this report.

DEPARTMENT OF THE INTERIOR,  
*Washington, January 29, 1926.*

HON. SCOTT LEAVITT,  
*Chairman, Committee on Indian Affairs,  
House of Representatives.*

MY DEAR MR. LEAVITT: This is in further reference to your letter of January 6, 1926, relating to H. R. 60 (69th Cong., 1st sess.).

This bill has in mind reclaiming approximately 4,000 acres of land, of which 3,400 acres are within the Lummi Indian Reservation, in Washington, the remaining area being in private ownership immediately adjacent to the reservation on the east. The reclamation scheme involves two separate units and will be accomplished by the construction of dikes. One unit is to prevent the tidewaters of Lummi Bay from overflowing part of the lands, while the other unit is to accomplish a similar purpose by preventing the Nooksack River from overflowing the remaining area of the lands. These lands are exceedingly fertile and their reclamation will greatly benefit the Indians by providing adequate farm areas for them.

This bill is identical with H. R. 11635 (68th Cong., 2d sess.), upon which favorable report was submitted to the chairman of the Committee on Indian Affairs, House of Representatives, under date of February 14, 1925.

The Director of the Bureau of the Budget has advised that this is not in conflict with the financial program of the President.

Very truly yours,

HUBERT WORK.

In the former report above referred to appears the following:

"This, as will be noted, is principally an Indian project. The bill provides for repayment of the con-



struction cost by the Indians under appropriate rules and regulations to be promulgated by the Secretary of the Interior and creates a lien against all such land benefited, which lien shall be recited in any patent issued for any particular tract prior to the reimbursement of the total amount assessable against same.

“Restriction is contained in section 3 of the bill relative to expending any of the funds authorized to be appropriated on behalf of the lands in private ownership until after appropriate repayment contracts shall have been executed by the landowners. This provision, it is believed, assures repayment of such landowners’ proper share of the cost.

“Section 4 of the bill provides for an interest charge on deferred installments owing by the private landowners.

“The bill appears to amply protect the Government’s interests, and I shall be pleased to see it receive favorable consideration by your committee and the Congress.”

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Supplemental legislation regarding the diking project created by the Act of March 18, 1926.

1. Second Deficiency Act of 1926, 44 Stat. 841, at page 856: Reclaiming lands on the Lummi Reservation, Washington—(reimbursable): For construction of dikes and other necessary work incidental thereto for the reclaiming of approximately 4,000 acres of land in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, as authorized by the Act of March 18, 1926, and under the terms and conditions of, and reimbursable as provided in, said Act, fiscal year 1927, \$65,000.

2. Interior Department Appropriation Act of 1932, 46 Stat. 1115, at page 1129: For further construction

work, including the placing of tide gates on the Lummi diking project, Washington, \$3,600, reimbursable as provided for by the Act of March 18, 1926 (44 Stat. p. 211), and the public notice issued pursuant thereto.

3. Department of the Interior Appropriation Act of 1934, 47 Stat. 820, at page 832: For repairing flood damage, Lummi diking project, Washington, \$8,000, to be immediately available and reimbursable.

4. Second Deficiency Act of 1933, 47 Stat. 1602, at page 1608: Reclaiming lands, Lummi Reservation, Washington: For an additional amount for repairing flood damages, Lummi diking project, Washington, fiscal years 1933 and 1934, \$17,600, reimbursable: Provided, that no part of this appropriation shall be expended for the benefit of any lands in private ownership until an appropriate repayment contract in form approved by the Secretary of the Interior shall have been properly executed by the landowners whose lands may be benefited thereby.

5. Department of the Interior Appropriation Act of 1937, 49 Stat. 1757, at page 1772: Washington, Lummi, \$20,000 reimbursable; Makah (dikes and flood gates), \$5,000, reimbursable; miscellaneous (domestic and stock water and garden tracts) \$20,000.

No. 15267

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UNITED STATES COURT OF APPEALS

*For The Ninth Circuit*

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PERCY HOOD and GRACE HOOD, His Wife,  
Appellants

vs.

UNITED STATES OF AMERICA,  
Appellee.

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*Appellants' Reply Brief*

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Appeal from the United States District Court for  
the Western District of Washington,  
Northern Division

Donald M. Bushnell,  
Ferndale, Washington,  
Attorney for Appellants.

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FILED

MAR 19 1957

PAUL P. O'BRIEN, CL





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In the United States Court of Appeals  
for the Ninth Circuit

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No. 15267

Percy Hood and Grace Hood, His Wife, Appellants  
v.

United States of America, Appellee

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Upon appeal from the United States District Court  
for the Western District of Washington, Northern  
Division.

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APPELLANTS' REPLY BRIEF

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ARGUMENT

Appellants respectfully submit that neither by logic or authority has the United States countered their contentions. We consider its answers in their order.

I.

Did the 1926 Act constitutionally impose a lien upon lands theretofore patented to individual Indians?

A. Did the Act refer to the lands here involved? — We had shown that the very sentence imposing the lien then said that the same “shall be recited in any patent issued therefor” — an impossibility because the lands had already been patented. All the United States could do was to permit a deed by the heirs. But appellee says that since all of the reservation land had been patented, and that this was reported to Congress, we must assume that Congress, by the term “Indian Land” meant to refer to the lands of the patentees. If so, the quoted reference must be read out of the Act, and we must assume without acquiescence, that as to the other questions discussed this Court will do so.

B. Did Congress have the power to impose the lien? — Likewise, on that assumption, appellee is forced to the dilemma stated in our brief (p. 27-28): Either the Indian heirs owned the land in fee simple or they did not; if they did, either the Act flaunted due process, or “fee simple” has another meaning when applied to the property of an Indian, and will permit, as against him, that which it would safeguard for a white man.

Appellee nowhere challenges the fee character of the title involved. Nor does it challenge, in law or in fact, our contention (brief, 30, 31) that in the passage of the Act (in its character as sheer fiat) there is no compliance with the mechanics of due process. So when it says that our claim of unconstitutionality is not “supported” it can only be taken to contend that Congress may, of its own whim, fetter the title.

Appellee completely fails to meet our challenge to produce any specific authority to sustain any such power. It apparently means to infer that such power can be found by analogy from the holdings of the court sustaining the right of the United States to postpone the periods in which certain Indian allottees and patentees were restricted from alienating; or to manage or even dispose of unallotted tribal lands held in common; or to be free from powers of state condemnation or taxation. Likewise it points to the holdings that the granting of citizenship to Indians has not diminished those powers. It cites *U.S. vs. Gilbertson* 111 F. 2d 978; *U.S. v. Celestine*, 215 U.S. 278, 54 L. Ed. 195, 30 S. Ct. 93, *Heckman v. U.S.*, 224 U.S. 413; 56 L. Ed. 820, 32 S. Ct. 424; *Tiger v. Western Investment Co.*, 221 U.S. 286, 55 L. Ed. 738, 31 S. Ct. 578.

But to say that because Congress has such powers



it has the entirely different power to invade private property of Indians is wholly a non sequitur. The nature and purpose of those powers need not be elaborated here. They are fully expounded at length in the cited cases. They are consistently founded on the right and duty of the United States to protect a weak people yet in a condition of pupilage. Their applications occurred mostly in the Plain states, when the land hunger and greed of both whites and some Indians created evils which the Indians, themselves, lacked the resources to combat. It was those considerations that led to the intervention of the United States to prolong the guardianship and to sue to cancel the conveyances made in violation of law, which were indeed void, but which in practice were used to deprive the Indians of the lands which were rightfully theirs. It was this concern which constituted the "national interest" to which Justice Hughes referred in the Heckman case, which appellee quotes.

All of these cases were brought to protect and preserve the properties of the Indians. But if it is true that the power to tax is the power to destroy, then it is true that the power arbitrarily to encumber private property is also the power to destroy or take. Such an Act is then, not the exercise of the power to preserve. The power to protect cannot give birth to its very opposite, as appellee contends.

Obviously those cases are not in point. We are not here concerned with the duration of restrictions; the case, in this phase, assumes their existence. Nor is the question of citizenship involved; indeed we argue that due process extends to the non-citizen; nor are there any questions of taxation, nor of tribal lands.

Appellee does not attack our authority denying the power of Congress in this case. In our brief (p. 22-

23) we were content to quote the text of 27 Am. Jr. 548 and 551 that the private rights of Indians were constitutionally secure. We deemed the proposition self evident. However, we now note the supporting case of *Mott vs. United States*, 283 U.S. 747, 75 L. Ed. 1385, 51 S. Ct. 642. Where an incompetent Indian's lands were leased for oil; huge royalties piled up; the Indian with the consent of the Secretary of the Interior gave \$500,000.00 to his wife who promptly divided with defendants having knowledge of all of the facts. Sustaining judgment to recover the Court said:

**"While the Secretary is authorized to prevent an improvident alienation he is not authorized to alien or lease in the stead of the allottee. If the latter chooses not to (alien or lease) the Secretary cannot do so for him, even though it appears that the Indian would be benefited. That fund was individual property and as such was within the protective guaranties of the Constitution".**

By this logic, if the Yahimaloo heirs in this case, had they been requested, could have refused to contract for the diking lien. If Congress could not compel their signature to a contract, how much the less could it, ipso facto, impose a lien without even making the request.

In *Jones v. Meehan*, 175 U.S. 1, 44 L. Ed. 49, the facts boil down to a finding that by treaty an Indian chief had immediately acquired an equitable title and that notwithstanding that a patent had not been issued, Congress had no right as against the grantees of his heirs to attempt to limit or control his rights in the land. The court held that because of the manifest superior advantages of the United States in negotiating treaties with Indians, words should be con-

strued with the meaning which Indians would attach to them. Now the Lummi treaty gave the President discretion to make allotments and patents. Can it be doubted that the Indians would assume that they were to have them as a matter of right. At any rate the President and his aids did so construe them for some 70 years. Their only source was the treaty. The Indian title being one in fee simple, how could Congress by mere fiat mortgage their lands any more than it could restrict Chief Moose's rights?

See also *Choate v. Trapp*, 224 U.S. 665, 56 L. Ed. 941, 32 S Ct. 565, holding that rights to tax exemption under a treaty were vested and protected by due process.

Appellee exaggerates the importance of the distinction we made as to trust patents and restricted fee patents. We intended merely to point out that a fee title on its face has a stronger character than does an equitable one. What particular rights an Indian would have under a trust would depend upon the terms of the treaty or statute creating it, but a fee would need no interpretation. In a trust arrangement the trustee (U.S.) might, even have discretionary powers as to the granting or rescinding of allotments. That the courts considered trust allotments as something less than fees is shown by the reference in *U.S. v. Rickert*, 188 U.S. 432 (436) to the term not being "happily chosen", and also by the note to *Minnesota v. U.S.* 305 U.S. 382, 83 L. Ed. 235 (cited by appellee) describing the contention of a state that it had power to condemn Indian land as "stronger" in the case of restricted fees than in trust allotments.

Nor is there applicability to the case at bar in the holding that for inheritance tax purposes only in the



Oklahoma oil area trust allotments and restricted fees are to be treated alike. Obviously such a tax could be levied on the value of either. *West v. Oklahoma Tax Comm'n*, 334 U.S. 717, L. Ed. S. Ct.

Appellee paints us as relying mainly on *Ross v. Eells*, 56 Fed. 855 and *U.S. v. Kopp*, 110 Fed. 160 and *Eastman v. U.S.* 28 F. Suppl 807. "to support our constitutional argument." But the first two cases were cited simply in support of the fee simple nature of the title here involved. Our Washington court, in so holding in *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, was well aware that the first had been reversed on other points when it adopted it as authority on that point. Nor does the fact, that we may concede that Judge Hanford's ultimate holding in *U.S. v. Kopp*, *supra*, that citizenship, plus patenting of all of the reservation land, had the effect of terminating the guardianship over the Indians was erroneous, deprive that case of its authority on the fee simple question.

Likewise the reversal of the *Eastman* case in *U.S. v. Eastman*, 118 F. 2d 421, cannot give appellee any comfort. The earlier case held as a matter of principle that an Indian allottee (or fee holder, it is not clear which) had vested rights which could not be interfered with. The court deemed the attempt to require the Indian owners to conform to a certain pattern of timber cutting was such an interference. The Circuit Court did not in substance differ with the principle of vested rights. It simply held, and we concede, correctly, that because the Secretary of the Interior had the right to forbid alienation in any respect, he could demand such compliance as a condition to his consent to the sale of timber; in short that his right to deny permission included the right to deny permission for part. The court was far from holding



(as would be parallel to the case at bar) that had the Indians not wished to sell timber he could not have compelled them to sell at all, much less on a prescribed pattern.

## II.

Can equitable considerations be invoked to pass title to appellants prior to approval of the deed by the Secretary?

We welcome appellee's admission (its brief, 13) that the equitable considerations developed in our brief "do and should apply in certain cases" but, not to this case, it says. Let us examine the attempted grounds of distinction.

We find that as to all of them, the argument is bottomed on the idea that the 1926 Congress, in passing the Act, had created new duties upon the Secretary and new burdens on the transaction; that in all phases of these contentions appellee could ignore the acts and laws existing in November 1925 when negotiations were had, and ignore the trial court's finding that all of the Hood transactions complied with existing law and regulations. In other words: it is contended that a subsequent Congress can undo the rights achieved under the lawful acts of its predecessor. Absent this alleged and novel power of Congress our contentions, it seems, are admittedly sound.

First, appellee says that the Secretary could not "fly in the face" of the 1926 Congress and grant a title free of the lien created by it. This clearly begs the question. He was only required to honor the "Memorandum of Sale" executed by his own authority delegated to his subordinate, the Indian Agent, and sanctioned by the only law that could apply to it, the law existing in 1925.

Next it says that there could be no equitable con-

version as to title, because such presupposes that the parties were capable of performance at the time, and nothing remained to be done but the payment of money. It forgets, as to the latter, that the money, in the form of the cash and notes bargained for, were paid and made in November 1925. As to the former, he says the Indian heirs did not have a title they could pass in November. But they had a fee which under existing law they were entitled to sell if they proceeded by the regulations. They had, in other words, the right recognized by existing law to cause to be executed in their behalf the "memorandum of sale" which, so far as they were concerned, was binding upon them and the Hoods. Thus, in November, rights accrued. That they were subject to defeasance by disapproval by the Secretary did not annihilate the rights; it merely made them subject to a conditional subsequent.

Appellee denies that the doctrine of relation back from the date of delivery of a deed to the date of its execution can be invoked, because, it says, rights of an innocent **third** party have intervened and because the result would be unjust. The third party, appellee says, is itself. It so contends in the face of the fact of its own participation in the deal; in the face of its own laws and regulations requiring it in proper instances, through the Secretary and his subordinates, to arrange such deals; in the face of the signature of its own authorized agent on the "memorandum"; in the face of its possession of the Hoods' notes and cash. The third parties, who were to be protected under the cases from the application of the doctrine were all innocent and subsequent purchasers. In the cases cited in our brief when the third parties had knowledge their claims were held to be null.

As to injustice barring the doctrine, all of the cases say that its purpose is to prevent injustice, and such preventable injustice is to be found in the loss of contractual rights otherwise resulting from the failure to apply the doctrine. None of the cases have ever suggested that convenience to a third party, the obtaining of some right or power such as the lien in this case, by which the third party wished to subserve some purpose of its own, would override the right of the contracting party, to his due under his contract.

Appellee says that the project increased the value of the lands and that appellants should help pay for it. Whatever may be said as to the effect on other lands, appellants and their co-plaintiffs in this cause vehemently deny that as to their lands. Certainly the point was not in issue or litigated herein and its very assumption here is arbitrary. To the extent that appellants had rights under the contract the attempt to enforce the liens upon them is an outright denial of due process.

Appellee's contentions come down to this:— we entice you into a contract, take your money and notes and give you a promise; while we are going about effecting our promise we decide we want to do something for someone else; so while with one hand we hold on to your money and notes, with the other we heap upon our promises burdens to you that were never thought of; burdens for the benefits of others; but we are the sovereign; we can change our minds but you can't; take it and like it; the Constitution — what is that?

### III.

Are appellants liable for maintenance charges?

Appellee says these charges are authorized by Acts

and appropriations passed by Congress subsequent to the time appellants obtained their approved deed, wherein Congress said that the same should be "reimbursable". Government appeal counsel is not familiar with the facts. Actually the charges for maintenance included in the foreclosure judgement were regular routine annual charges such as were mentioned in the proposed agreement sought from the plaintiffs in this case. But, even if they were based upon the said subsequent appropriations, appellee finds sanctions for them in the "contemplation" (the mental attitude) of Congress that reimbursement should be made and that appellants and others should be the victims as to payment because there was no one else they could be imposed upon. These are indeed novel sanctions. That no authority is cited for their support is not surprising. That portion of the judgment is without foundation regardless of the other phases of the case.

### Conclusion

The alleged lien could not have been constitutionally imposed upon the Indian titles. Also, the Hoods' title, in order to effect the justice required by the sale to them, related back to before the Act. In any event there is no sanction for the maintenance charges.

Respectfully submitted,

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